Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. .....75-1005

NATIONAL ORGANIZATION FOR WOMEN, INC., CATHLEEN BEASLEY, BONNIE HALASCSAK and LESSIE BOLIN FIX, on behalf of themselves and similarly situated females,
*Intervenor Applicant and Intervenors-Petitioners,*

UNITED STATES OF AMERICA by William Saxbe, the Attorney General on behalf of PETER J. BRENNAN, the Secretary of Labor, and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiffs-Respondents,*

v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., ARMCO STEEL CORPORATION; BETHLEHEM STEEL CORPORATION; JONES & LAUGHLIN STEEL CORPORATION; NATIONAL STEEL CORPORATION; REPUBLIC STEEL CORPORATION; UNITED STATES STEEL CORPORATION; WHEELING-PITTSBURGH STEEL CORPORATION; YOUNGSTOWN SHEET & TUBE COMPANY; and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
*Defendants-Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**OCTOBER TERM, 1975**

**No. .....**

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UNITED STATES OF AMERICA by William Saxbe, the Attorney General on behalf of PETER J. BRENNAN, the Secretary of Labor, and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., ARMCO STEEL CORPORATION; BETHLEHEM STEEL CORPORATION; JONES & LAUGHLIN STEEL CORPORATION; NATIONAL STEEL CORPORATION; REPUBLIC STEEL CORPORATION; UNITED STATES STEEL CORPORATION; WHEELING-PITTSBURGH STEEL CORPORATION; YOUNGSTOWN SHEET & TUBE COMPANY; and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
*Defendants-Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 18, 1975.

## OPINIONS BELOW

The decision and order of the United States District Court for the Northern District of Alabama, dated June 7, 1974, is reported at 63 F.R.D. 1 and set forth on pages A-26-A-32 of the Appendix to this Petition.[1] The decision of the United States Court of Appeals for the Fifth Circuit is reported at 517 F.2d 826 and set forth in part at App. A-1-A-25.

## JURISDICTION

The opinion of the Court of Appeals was filed on August 18, 1975. On November 6, 1975, Mr. Justice Powell signed an order extending the time for filing a petition for a writ of certiorari to and including January 15, 1975. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court below misconstrued Title VII, 42 U.S.C. Sec. 2000e, and the applicability of Rule 24, F.R.C.P. by holding that intervention is inappropriate in Section 707 pattern and practice employment discrimination cases.

2. Whether the Court of Appeals erred insofar as it held valid a waiver, executed pursuant to a Government consent decree, of the right to sue for injunctive relief and back pay to remedy the failure by an employer or a union subsequent to the entry of that decree, to eliminate the continued effect of past discrimination.

3. Whether the Court below erred in approving the consent decrees which purport to remedy the discriminatory practices systemic to the steel industry but which fail to ensure female employees their rightful place and otherwise to accomplish the purposes of Title VII and Executive Order 11246, as amended.

1. The Appendix to this Petition will be referred to herein as "App."



## STATUTES INVOLVED

The statute involved herein is Title VII to the 1964 Civil Rights Act, as amended, 42 U.S.C. Sec. 2000e *et seq.* Also involved in these proceedings are Executive Order 11246, as amended, 3 C.F.R. 169 *et seq.* and Rule 24 of the Federal Rules of Civil Procedure which provides in pertinent part:

"Rule 24.

Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (2) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common * * *."

## STATEMENT OF THE CASE

The facts in this case are not in substantial dispute and are in large part adequately set forth in the decision of the Court of Appeals. It should be noted, however, that the record below contains evidence, discussed by neither the Appellate Court nor the District Court, that petitioner National Organization for Women, Inc. (hereinafter "NOW") sought to discuss with the Equal Employment Opportunity Commission (hereinafter "EEOC") the subject matter of

the consent decrees long before any agreement thereon was reached among the parties.[2] NOW's request to participate in the discussions as well as to share with the parties the concerns of the women it represents was summarily rejected by the EEOC.[3] Similarly, although the petitioner requested an opportunity to present certain limited evidence on issues it claimed inadequately remedied by the decrees, the District Court refused to allow such a hearing. (App. A-28).[4]

## REASONS FOR GRANTING THE WRIT

### A. The Intervention Question

The Court's decision prohibiting intervention in pattern and practice cases has serious and potentially invidious

2. The decrees had been negotiated in a series of meetings in which no affected employee nor their civil rights representative participated. In November 1973, petitioner's representatives met with representatives of the United States Department of Justice to express NOW's concerns about systemic discrimination in the steel industry. A similar meeting was held with EEOC Chairman Powell in February, 1974. On March 21, 1974 NOW wrote to Powell confirming its interest in the steel industry negotiations and advising him that now was representing several classes of women who had filed charges of discrimination with the EEOC. NOW asked, *inter alia*, that it be kept advised as to the status of negotiations so that it could represent the interests of its members, and particularly that NOW be notified of any potential settlement sufficiently in advance of the filing of the consent decree so that it could determine whether it would be in the best interests of the women it represents to seek to join in the action as a party plaintiff. (See record in court below at pp. 85-86).

3. On April 9, 1974 EEOC Chairman Powell acknowledged NOW's interest in the negotiations but stated:

> "It is not, however, our policy to submit for review outside of government channels proposed consent decrees."

(See record in court below at p. 87).

4. Anomalously the Court below noted that "the female appellants did not introduce any evidence into the record which might enable a court to develop this point [NOW's challenge to the decrees' failure to provide certain remedies] in greater detail." (App. A-25). Thus the Appellate Court rejected such contentions on which petitioner had been denied the opportunity to present evidence to the District Court or even to discuss its serious concerns with the EEOC, notwithstanding its timely raising thereof.



implications for the accomplishment of Title VII's objectives. The Court below held that whereas Sec. 706(f)(1) of the Act confers a right of intervention to aggrieved parties or their representatives, no such intervention right obtains under Sec. 707, so-called pattern and practice cases (App. A-10-A-12). In this respect, the Court's holding appears to present an issue of first impression.[5]

In so ruling, the Court below ignored the valuable role, acknowledged generally by this Court and every appellate court, of the "private attorneys general" which has in the past been critical to enforcement of the Act. If the Court's decision were allowed to stand, the EEOC and alleged discriminators would have *carte blanche* to negotiate "pattern and practice" agreements without any input from members of the affected class or classes. It cannot be gainsaid that the EEOC with its notorious backlog, budgetary problems, etc., has concerns in such settlements which are not entirely on all fours with those of the employees concerned. Nor can the EEOC, in the course of its discussions with the putative respondents be expected to be cognizant with all of the problems and discriminatory conditions in a given industry. Here, for example, NOW offered to introduce evidence of a range of discriminatory practices, past and present, which were not addressed by the decrees purporting to bring the respondents into compliance with the Act.[6] Nonetheless, the Court below placed its imprimatur upon the EEOC's callous refusal even to listen to concerns of the thousands of female employees represented by petitioner.

5 The Court relies in part on *dicta* in *EEOC v. United Airlines*, 515 F.2d 948 (7 Cir. 1975). That case, however is not dispositive of the issue inasmuch as the denial of intervention therein was based upon untimeliness, as the Fifth Circuit acknowledged.

6. See *infra*, pp. A-8-A-12.

The role of the aggrieved party as intervenor is inherent in the statutory scheme. Indeed, Section 707(e), 42 U.S.C. Sec. 2000e—6(e) specifically incorporates Sec. 706 procedures into actions brought pursuant to Sec. 707, including the right to intervene. Inasmuch as Section 707 actions attempt to adjudicate broader issues and create more effective, far reaching remedies than do Section 706 actions, there is logically even more justification for inferring that Congress intended a role for the aggrieved or their representatives in such cases.

In *Trbovich v. UMW*, 404 U.S. 528, 92 S. Ct. 630, this Court recognized the importance of intervention to protect private interests such as those represented by NOW, saying [404 U.S. at 538-539]:

> "The statute plainly imposes on the Secretary the duty to serve two distinct interests which are related but not identical. First the statute gives the individual union member certain rights against their union and the Secretary of Labor becomes the union member's lawyer for the purpose of enforcing these rights. 104 Cong. Rec. 10947, 1958, remarks of Senator Kennedy. Second, the Secretary has an obligation to protect "the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member. *Wirtz v. Local 153 Glass Blowers Association*, 389 U.S. 463, 475 S. Ct. 643, 19 L.Ed. 705 (1968). Both functions are important and they may not always dictate the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of "his lawyer". Such a complaint filed by the member who initiated the entire enforcement proceeding should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2)."

7. This Court has consistently protected the private rights of organizations such as NOW in cases by the government seeking to vindicate public interests. See, eg., *UAW v. Scofield*, 382 U.S. 205 (1965).



Thus under the *Trbovich* rationale, the Court below erred in approving denial of intervention to petitioner representing the interests of women whose charges, at least in part, presumably gave rise to the government's investigation of and action against the Steel industry.[8] See also, *Hodgson v. UMW*, 55 F.R.D. 227 (D. Ct. Pa. 1972) where the Court permitted intervention of parties who were among those who had filed the complaints which had generated the litigation. See also, *Donaldson v. U.S.*, 91 S. Ct. 534 (1971); *Dowdy v. Hawfield*, 189 F.2d 637 (D.C. Cir. 1951) *cert. denied*, 72 S. Ct. 54; *American Jerex v. Universal Aluminum Extrusions*, 340 F. Supp. 524 (D. Ct. NY 1972); see also, *EEOC v. AT&T Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *affirmed in part, dismissed in part*, 506 F. 2d 735 (3 Cir. 1974).[9]

Thus the intervention question posed by this case and

8. Inasmuch as the charges upon which *NOW v. Bethlehem Steel*, Civ. No. M-74-377 (D. Ct. Md., pending) is based, were filed with EEOC in 1973, fully investigated and determined meritorious in 1974, it can reasonably be assumed that such charges were among those which generated the industry-wide settlement discussions which resulted in the consent decrees.

9. In *AT&T*, the organization representing the aggrieved employees was allowed to intervene at least to the extent of the charge filed with the EEOC. Unlike *AT&T* where the intervenor-applicant had been requested to participate "time and time again" in the negotiations which led up to the consent decree and had "defiantly" rejected participation, here NOW had persistently attempted to participate and had been summarily denied the right to do so. [365 F. Supp. at 1127].

The Court below attempted to distinguish the *AT&T* case on the grounds that it was a case brought pursuant to Sec. 706, not Sec. 707. However, as shown above, such distinction does not stand up to logical analysis inasmuch as the intervenor obviously would have even more interest in participating in a pattern and practice case than in a case of narrower scope and thus lesser impact on the interests intervenor seeks to represent.

erroneously decided by the Court below involves a fundamental interpretation of Title VII and the applicability thereto of Rule 24, F.R.C.P. and is of far reaching importance to the future of the civil rights movement. For, allowed to stand, the decision of the Fifth Circuit herein could foreclose the ability of individuals affected by government-negotiated decrees to have an effective voice in the process of remedying employment discrimination and seriously jeopardize full enforcement of all of the rights guaranteed by the Act and by the U.S. Constitution.[10]

**B. The Waiver Question**

Petitioners have been advised that Intervenor-Appellants in the court below, Sidney S. Harris, *et. al.*, intend to file a petition for writ of certiorari on the issue of the validity of the waivers contemplated by consent decree I.[11] Inasmuch as petitioners in the court below espoused the same legal positions in respect to this issue as did the Harris Appellants, rather than burden this Court with potentially duplicative argument, we wish merely to subscribe to the positions contained in the Harris petition and to incorporate such positions herein as if set forth *in haec verba*.

**C. The Inadequacies of the Consent Decrees**

Evidence before the courts below[12] established that the underrepresentation of women in the steel industry is a result of systemic efforts in the mid-1940's to rid the indus-

10. As we show below, the lower Court's belief that the decrees do not impair or impede individual rights because individuals retain a right of private action is unbelievably naive in view of the overwhelming preponderance of resources accumulated against such individuals as a result of the decree requirement that the government take the side of the discriminators in any such separate litigation (App. A-4).

11. The Harris petition is also due January 15, 1976.

12. Petitioners introduced affidavits of former employee Lessie Fix.



try of females employed therein during World War II and thereafter to exclude women by a ban on hiring. Despite the statistical absence of women from employment, or at best, tokenism by virtue of recent hiring, the government negotiated a settlement which did nothing to redress the effects of the past discriminatory discharges and hiring bans. Thus the decrees are internally defective inasmuch as they perpetuate such sex discrimination and fail to correct its past effects, contrary to this Court's mandate in *Albemarle Pape Co. v. Moody*, 422 U.S. 405, 412, 95 S. Ct. 2362, 44 L.Ed. 2d .... (1975).[13]

Moreover, consent decree II compounds the effects of the past discriminatory discharges by basing promotion

13. In *Moody* and its predecessors, this Court and the lower courts have recognized that an employer's history of discrimination, such as that extant in the steel industry, has the effect of deterring employees from seeking better employment positions and thus requires that the appropriate remedies account for the realities of entrenched employment discrimination. Clearly, under the *Moody* rationale, it is not sufficient, as the Fifth Circuit suggests, simply to institute prospectively nondiscriminatory practices, even assuming such institution occurred as of the effective date of the Act. Employees affected by pre-Act discrimination must be considered and made whole by placing them in positions they would have held but for the discrimination. Thus the decrees herein are deficient in that they take no steps to remedy the present effects of the discrimination practiced against the class of women represented by Petitioners. See also, *Johnson v. Goodyear Tire Co.*, 491 F.2d 1364 (5 Cir. 1974) where the court reached back more than eight years before the effective date of the Act to rectify such historic discrimination and to make whole its victims. Indeed, the instant case is *a fortiori* to *Johnson*, for while that case involved reduced earnings and promotional capacity of individual discriminatee, the instant case represents the unremedied systematic discharge of an entire class of employees. In *U.S. v. Jacksonville Terminal*, 451 F.2d 418 (5 Cir. 1972), *cert. denied*, 406 U.S. 906 (1972), the Appellate Court properly concluded that the government had the right to introduce evidence of pre-Act discrimination dating as far back as the 1930's. Incredibily then, this same Appellate Court in this case condoned the government's failure even to attempt to redress in any fashion the discrimination practiced against the former female employees represented by Petitioners. Such remedial omission is merely one of the numerous egregious defects in the decrees which the courts below erroneously overlooked and condoned.

goals on units in which women are underrepresented as a result of past discrimination. That decree provides that goals and timetables in trade and craft jobs are on the basis of percentage representation in production and maintainance units within the plant or facility. This provision, upheld by the courts below, makes a mockery of any requirement that the steel companies promote females into the trade and craft jobs, inasmuch as women have been historically frozen out of production and maintainance jobs.[14] This inherent defect was pointed out to the courts below but was erroneously rejected as insufficient to invalidate the decrees.[15]

In addition, the transfer provisions do not afford current female employees their rightful place, as required by this Court's rationale in *Moody, supra*. Despite the discriminatory segregation of women employed in the steel industry into clerical and plant security positions, the decree, although purporting to remedy such discrimination, incredibily fails to provide the carryover of seniority and rate retention from those departments to production and maintainance jobs, and even more incredibily nonetheless was approved by the reviewing court.[16] For it is anomolous

14. The court below rejected this argument on the false premise that the hiring goals for p&m would rectify the trade and craft problem. The court's rationale erroneously is premised on the availability of new jobs which, of course, in today's layoff economy is nonexistent. Indeed, any upward movement of of discriminatees has been totally stultified by layoffs and the incumbency of white males in higher positions.

15. See, *Erie Human Relations Commission v. Tullio*, 493 F.2d 371 (2 Cir. 1974), where the court approved a one-to-one ratio to remedy systemic discrimination. Manifestly, insofar as decree II purports to cure the discriminatory exclusion of women from trade and craft jobs by basing promotion goals on production and maintainance units, it is legally inadequate, as the courts below should have held.

16. Indeed, the minimal rate retention provisions fail adequately to protect all current female employees, not just those in office clerical positions. For inasmuch as the steel industry has only recently begun to hire women in any significant, albeit insufficient numbers, most women are not protected by the decretal provisions guaranteeing rate retention only to those employees whose service dates preceed January 1, 1968.



that the Fifth Circuit would grant its imprimatur to such a woefully insufficient remedy when it has, in the past, considered rate retention and seniority carryover prerequisite to the effective elimination of such segregationist policies. See, eg. *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 450, where the Fifth Circuit said that:

> "the rightful place theory dictates that we give the transferring discriminatee sufficient seniority carryover to permit the advancement [she] would have enjoyed and to give [her] the protection against layoffs [she] would have had in the absence of discrimination. How much seniority the transferee deserves should be determined by the date [she] would have transferred but for [her] employer's discrimination."

Accord: *Wicker v. Hoppock*, 6 Wall. 94, 99, cited by this Court in *Moody, supra* at 418.

Thus clearly the court below erred in approving the decree which failed to contain such a basic remedial guarantee. Indeed, the extent of the court's error in approving the decrees is disclosed by the fact that it fails totally to provide any redress to female discriminatees in office clerical or plant security positions. Nowhere is this more evident than in the back pay provisions. Paragraph 18 C of consent decree I limits those eligible for back pay to the employees in production and maintainance units.[17] And if the date of production and maintenance employment of those few

17. Even if they do not qualify for back pay and thus are not required to execute a waiver, all present female employees are bound by the injunctive provisions of the decrees insofar as they purport to remedy past discrimination and thus are nonetheless frozen into less favorable circumstances than they would be absent the all-encompassing injunctive relief, compliance with the decree constitutes compliance with Title VII provisions. See esp. App. A-17, where the court stated its interpretation of the decree's impact on this matter:

> "injunctive relief provided by the consent decrees extends to all affected steelworkers, regardless whether they elect to accept the back pay and execute the releases."

women who have finally managed to overcome the discriminatory hurdles thereto does not preceed January 1, 1968, such women are not even guaranteed the miniscule minimum of $250 provided by that decree.[18]

The foregoing defects in the decree, plus numerous others equally as egregious and counterproductive to the elimination of discrimination in the steel industry were overlooked or brushed aside by the courts below in their respective zeal to execute and affirm the valadity of the woefully deficient decrees.[19]

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18. See: *Meatcutters v. Safeway Stores*. ... F. Supp. ..., 4 FEP Cases 510-511 (D. Ct. Kan. 1972), where the court rejected as "neither fair nor reasonable, and grossly inadequate" a wage settlement approximating 50% of unpaid wages due—a percentage far greater than the formula devised herein, which falls far short of making steel employees whole for years of discrimination.

19. The issues discussed herein are not intended to be exhaustive of the multitudinous defects in the decrees, but merely to exemplify the error committed by the courts below in approving them. For example, the procedural scheme established by consent decree I also perpetuates discrimination in that it vest virtual sole authority in the hands of the discriminators who predominate on the Audit and Review Committee and on the Implementation Committees. Despite the presumptive bias of such committees, that decree abrogates the authority of governmental compliance agencies to pursue compliance with Title VII and state FEP acts and vests sole authority in these committees.

Moreover, the decree may be a substantial impediment to pursuit of private litigation in that it provides for transfer of such litigation to the District Court for Northern Alabama. Insofar as this provision in consent decree I may require private plaintiffs to litigate in a forum *non conviens*, in some cases geographically remote from homes, places of business, it will work further hardship on litigants already burdened by the awesome task of suing the behemoth steel corporations with their enormous resources. Compounding that imbalance, the decree approved by the courts below now adds the additionally vast resources of the federal government to the side of those accused of violating federal law. Consequently, it is simply incredible, that the Fifth Circuit consistently relied, both in its denial of intervention and its affirmance of the decrees, upon the totally spurious suggestion that the decrees do not, "as a practical matter, operate to impair or impede the protection of [the interests of those represented by petitioners]" (App. A-13).



## CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue its writ of certiorari to review the decision below.

Respectfully submitted,

JUDITH LONNQUIST
*Counsel for Petitioners*

**UNITED STATES of America et al., Plaintiffs-Appellees,**

**v.**

**ALLEGHENY-LUDLUM INDUSTRIES, INC., et al., Defendants-Appellees,**

**Sidney S. Harris, et al., Intervenors-Appellants,**

**National Organization For Women, Inc., et al., Movants-Appellants.**

**No. 74-3056.**

United States Court of Appeals, Fifth Circuit.

Aug. 18, 1975.

The Equal Employment Opportunity Commission and Secretary of Labor brought action against nine steel companies alleging patterns and practices of hiring and job assignment discrimination on basis of race, sex and national origin and seeking to enforce the edicts of title VII and executive order. After consent decrees were entered, three organizations, four individuals and six groups of plaintiffs moved to intervene and to vacate the decrees. The United States District Court for the District of Alabama, Northern Division, Sam C. Pointer, Jr., J., 63 F.R.D. 1, granted intervention to certain movants and denied intervention to others, refused to vacate the decrees and appeals were taken. The Court of Appeals, Thornberry, Circuit Judge, held that women's feminist organization enjoyed no unconditional statutory right to intervene, and no abuse of discretion was shown in denial of permissive intervention by the organization; that provisions in consent decrees requiring each employee to execute release in order to receive back pay did not provide for release of prospective rights and was not against public policy; that provisions of decrees relating to the mechanics and procedures of ongoing enforcement did not constitute an unlawful abdication of responsibilities by agencies of government; that the mechanics of information compilation and production established by the decrees were sufficient to insure adequate judicial supervision; and that decrees would not be invalidated on ground that interested private parties and their counsel were not invited to participate in predecree negotiations.

Affirmed.

• • •

THORNBERRY, Circuit Judge:

These appeals present novel and important issues which require us to consider the scope of the federal government's authority to encourage and negotiate expeditious and efficient settlement of widespread charges of employment discrimination in the nation's steel industry. Some of these issues are procedural in nature; others call into question the substantive legality of the means utilized. Some issues are ripe for decision; others are essentially hypothetical and conjectural. During the interim between the oral argument of these appeals in December, 1974 and the present, we have carefully examined the attacks which have been advanced against the settlement. Our conclusion is that the settlement has not been shown to be in any respect unlawful or improper, and hence its terms, conditions, and benefits must go forward immediately in their entirety.

## I. INTRODUCTION AND BACKGROUND

On April 12, 1974, a complaint was filed in the federal district court for the Northern District of Alabama. The plaintiffs were the United States, on behalf of the Secretary of Labor, and the Equal Employment Opportunity Commission. Nine major steel companies,[1] and the United Steelworkers of America were named as defendants. The suit involved some 240-250 plants at which more than 300,000 persons are employed, over one-fifth of whom are black, Latin American, or female. Alleging massive patterns and practices of hiring and job assignment discrimination on the basis

of race, sex, and national origin, the complaint sought to enforce the edicts of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and contractual obligations under Executive Order 11246, as amended, 3 C.F.R. 169 *et seq.* (1974).

The complaint charged that the companies had violated Title VII and Executive Order 11246 by hiring and assigning employees on impermissible grounds, and by restricting ethnic minorities and females to low-paying and undesirable jobs with scant opportunities for advancement. The complaint also charged the companies and the union with formulating collective bargaining contracts which established seniority systems for promotion, layoff, recall, and transfer so as to deprive minority and female employees of opportunities for advancement comparable to those enjoyed by white males.

The filing of the complaint culminated more than six months of intensive, hard-fought negotiations between, on one side, the EEOCC and Departments of Justice and Labor, and on the other the companies and the union. Simultaneously with the filing of the complaint, the parties announced to the court that a tentative nationwide settlement had been reached. The parties multilaterally reduced their agreement to the form of two extensive written consent decrees. Describing the decrees as "a thoughtful and earnest attempt to respond to—and to reconcile competition between—charges of employment discrimination made on behalf of black, female, and Spanish surnamed workers and applicants,"[2] District Judge Pointer signed and entered the documents later that same day.[3]

Consent Decree I is aimed at the practices of the union as well as those of the steel companies. It permanently enjoins the defendants from "discriminating in any aspect of employment on the basis of race, color, sex or national origin and from failing or refusing to fully implement" the substantive relief set forth therein. The items covered by Consent Decree I are mainly matters historically encompassed by collective bargaining. The substantive relief falls into three basic categories: (1) immediate implementation of broad plantwide seniority, along with transfer and testing reforms, and adoption of ongoing mechanisms for further reforms of seniority, departmental, and line of progression (LOP) structures, all of which are designed to correct the continuing effects of past discriminatory assignments; (2) establishment of goals and timetables for fuller utilization of females and minorities in occupations and job categories from which they were discriminatorily excluded in the past; and (3) a back pay fund of $30,940,000, to be paid to minority and female employees injured by the unlawful practices alleged in the complaint.[4]

1. The companies are Allegheny-Ludlum Industries, Inc., Armco Steel Corporation, Bethlehem Steel Corporation, Jones and Laughlin Steel Corporation, National Steel Corporation, Republic Steel Corporation, United States Steel Corporation, Wheeling-Pitsburgh Steel Corporation, and Youngstown Sheet & Tube Company. According to one estimate, the complaint reached seventy-three percent of the country's basic steel industry. Brief for the appellee steel companies at 3 n. 2.

2. *See* United States v. Allegheny-Ludlum Indus., Inc., N.D.Ala. 1974, 63 F.R.D. 1, 3.

3. The two consent decrees are reprinted in BNA FEP Manual 431:125-152 (1974). The correct entry date, as reflected in the record, is April 12, 1974, rather than April 15.

4. Paragraph 18(c) of Consent Decree I defines as the affected classes of employees eligible to receive back pay: (1) minority (black and Spanish-American surnamed) employees in Production and Maintenance units who were employed prior to January 1, 1968; (2) all females in Production and Maintenance units as of the date of decree entry; and (3) those former employees who retired on pension within the two years preceding entry of the decrees, who, if they were still employed, would be within group (1) or group (2). Provision is also made for payment of back pay to surviving spouses of otherwise eligible deceased employees.



Consent Decree II and its accompanying Agreement deal with aspects of employment which are mainly company-controlled and thus not subject to collective bargaining. The companies again are broadly enjoined from any form of unlawful employment discrimination. Also, Consent Decree II requires the companies to initiate affirmative action programs in hiring, initial assignments, promotions, management training, and recruitment of minorities and females.

The decrees must be made to function in varying and peculiar situations in accordance with the parties' ambitious objectives. Furthermore, the parties contemplated that unforeseen interpretive issues will inevitably arise and require resolution. With these considerations in mind, the decrees provide for the establishment of implementation and enforcement procedures through a system of Implementation Committees. These committees are established at each major plant to which the decrees are made applicable. Each committee includes at least two union representatives, one of whom is a member of the largest minority group in the plant,[5] and an equal number of company members. The government is entitled to designate a representative to meet with any Implementation Committee. The Implementation Committees are charged with assuring compliance with Consent Decree I, including changes in local seniority rules and LOPs, as well as the establishment of goals and timetables for affirmative action under paragraph 10. In addition, it is the Implementation Committees' responsibility to furnish employees with information about their rights under the settlement.

The Audit and Review Committee, established under paragraph 13 of Consent Decree I, is the hub mechanism in the decree's system of continuing review, enforcement and compliance. It is composed on an industry-wide basis of five management members, five union members, and one government member. It meets regularly to oversee compliance with the decrees and to resolve disputes which come before it, including any questions that the Implementation Committees have been unable to resolve. Matters which the Audit and Review Committee cannot resolve unanimously may be brought before the district court. Furthermore, all parties to the decrees have stipulated on the record that paragraph 20 of Consent Decree I, which vests the district court with continuing jurisdiction for at least five years, permits the court to review fully and, if necessary, correct any action taken pursuant to the decrees, irrespective of whether a party requests such review. Beginning no later than December 31, 1975, the Audit and Review Committee will review the entire experience under Consent Decree I. The committee may then propose remedial steps at any plant in order to overcome deficiencies in either the decree or its results. If the government representative remains dissatisfied with a committee proposal, he may take the matter to the district court. Finally, the Audit and Review Committee is responsible at least annually for reviews of the various Implementation Committees' performance in establishing and fulfilling affirmative action goals in job assignment, hiring, promotion and seniority, and minority-female recruitment.

As the district court correctly determined, neither decree purports "to bind any individual employee or to prevent the institution or maintenance of private litigation."[6] At the time of the decrees' entry, hundreds of employment discrimination charges were pending against the defendants before the EEOC and federal district courts scattered throughout the country. Between twenty and sixty thousand minority and female individuals then stood beneath the overlapping umbrellas of these charges as members

5. Paragraph 12 of Consent Decree I provides for a second minority member at plants in which at least ten percent of the employees comprise a second minority group, unless one of the union representatives is already from that minority group.

6. 63 F.R.D. at 4.

of putative aggrieved classes in actions seeking systemic injunctive relief and back pay. Thousands still do, and the problems of administrative and judicial management are truly awesome.[7] The consent decrees establish a formula for expeditious and coordinated resolution of the multitude of pending charges. With respect to pending cases in which district courts have already entered remedial decrees, the government, companies, and union have agreed to petition those courts for amendments to conform their relief to that contained in the consent decrees. The same action is being taken with respect to orders of the Secretary of Labor, rendered pursuant to Executive Order 11246, which were issued prior to entry of the decrees. In regard to other pending litigation, the parties to the consent decrees have agreed that release forms and notices to employees pursuant to subparagraphs 18(g) and (h) of Consent Decree I shall be forwarded to the courts trying the private actions, as well as to Judge Pointer for approval prior to distribution to all other affected employees. The parties have agreed on the record that they will observe any order or instruction issued by any of these courts. Audit and Review Committee Directive No. 1, ¶ 5, May 31, 1974.

Under introductory paragraph C of each decree, the government has stipulated that in future cases involving private claims for relief, *other than back pay*, which would be inconsistent with the systemic relief provided by the decrees the government will suggest to the forum court that the relief sought is unwarranted in the separate proceeding. The government, however, may proceed through the Audit and Review Committee mechanism to recommend that matters raised in the separate proceeding be submitted to Judge Pointer for resolution within the framework of the consent decrees. The government concedes, of course, and no one seriously argues contrariwise, that no forum court will be

7. A revealing illustration is the purported class action involving United States Steel's Fairfield Works in Alabama, now pending on appeal before this court, No. 73-3907, Ford, et al. v. United States Steel Corp., et al., partially reported below at 371 F.Supp. 1045 (N.D.Ala. 1973). Approximately 12,000 people are employed at Fairfield Works, around 3,100 of whom are black. Between six and eight private class actions were consolidated for trial. Back pay was awarded to some members of three classes, but denied as to the other classes. A total of sixty-one people, or thirteen percent of the members of the certified private classes, received back pay awards. The other eighty-seven percent, or 403 blacks, were denied back pay. Nonetheless, in anticipation of the appeal, the district court on May 2, 1973 amended the class certification order to redefine the plaintiff class as: (1) all blacks, except those already members of a private class whose rights had been adjudicated, who had been employed at Fairfield Works at any time prior to January 1, 1973; and (2) all blacks who had unsuccessfully sought employment at Fairfield Works prior to January 1, 1973. Although we have no reliable estimate on the combined size of the resulting class, subclass (1) alone is sufficiently large to have encouraged the defendants to enter into consent decrees with the government, in which $30.9 million is promised in back pay, "several million dollars" of which represents United States Steel's allotment, principally for blacks, but also for female and Spanish-surnamed workers at Fairfield Works. Brief for Appellee United States Steel Corp., at 7, No. 73-3907, Ford, et al. v. United States Steel Corp., et al.

The Fairfield Works case also involved pattern or practice charges brought by the United States, resulting in an appeal by the government from denied of certain injunctive relief and denial of back pay to black employees who were not represented in the private class actions. Since the government is now admittedly satisfied with the rate retention and back pay provisions of subsequently-negotiated Consent Decree I, paragraphs 8 and 18 thereof respectively, it has withdrawn its appeal in *Ford* pending our decision as to the validity of the consent decrees *sub judice*. Stipulation of the Parties, filed July 8, 1974.

Last, but not least, in an Order filed December 23, 1974, Judge Pointer entered an unopposed amendment in *Ford* conforming the injunctive relief for Fairfield Works to that provided by the consent decrees, in all minimum respects except back pay. Since the issue of classwide back pay is still on appeal to this court in *Ford*, Judge Pointer ordered postponement of further back pay availability in that case until final decision of the appeals in *Ford* and in this case.



legally obliged to follow any government recommendation of dismissal, stay, or transfer as to any separate suit filed in such court.

With respect to charges pending at the administrative level at the time of the decrees' entry, the EEOC has agreed in paragraph 19 to expedite its processing schedule. The Commission will first identify those charges that allege violations for which the appropriate remedies are wholly within the scope of the decrees. In those cases, the EEOC will consider the charges settled and so notify the charging party. In addition, it will recommend to the charging party that he or she accept the back pay provided under paragraph 18(c) of Consent Decree I. As discussed, *infra*, the charging party is free to reject the EEOC's recommendation and commence a private suit for greater back pay or any other relief. As for pending charges that relate to matters which are not wholly within the scope of the decrees, the Commission will conduct the usual investigations and attempt to conciliate the charges. In all such cases, the time in which a charging party must decide whether to claim the back pay under paragraph 18 will be suspended during the administrative proceedings.

The overriding goal of the United States, the Secretary of Labor, the EEOC, the companies, and the union is comprehensive, final and fair settlement of charges of unlawful employment discrimination arising from patterns and practices alleged upon the part of the companies and the union up to and including the entry date of the consent decrees. Accordingly, introductory paragraph C of each decree provides for binding resolution, between and among the parties to the decrees, of all issues treated by the decrees, together with all issues which may arise as future effects of the resolved pre-decree discriminations. To the extent the defendants maintain compliance with the decrees as to issues covered and which through the various procedures may become covered thereby, the government has agreed that it shall deem the defendants to have complied with Title VII and Executive Order 11246.[8] As to matters which originate in discriminations occurring prior to and including the entry date, and which are covered by the complaint or the decrees, the settlement is *res judicata* between and among its signatories.

Two important factors, however, warrant clarification at this point. First, no private individual, as such, is a party to the consent decrees. Thus, the consent decrees do not seek by their terms to bind private individuals by way of res judicata or estoppel by judgment. It is only through the acceptance of the back pay and legally effective execution of the release contemplated by paragraph 18(g) of Consent Decree I that a private individual can compromise, by virtue of the decrees, any right that he may have. Apart from the $30,940,000 back pay fund, paragraphs 17 and 18 establish mandatory procedures for fully informing private parties of their rights. Paragraph 18 sets up specific guidelines and standards for computing and delivering back pay awards to electing employees. The Implementation Committees, the Audit and Review Committee, and ultimately the district court bear the critical responsibility to insure that individual employees have the opportunity to make free, intelligent decisions whether to accept the back pay under the consent decrees.

The second factor relates to the nature of the consent decrees' finality as contemplated by paragraph C. In that paragraph, the plaintiffs United States, the Secretary of Labor, and the EEOC have stated in so many words that they consider the decrees remedially adequate to bring the defendants into present compliance with federal anti-discrimination law and to compensate individual employees for the past and continuing effects of the alleged discriminatory

8. Paragraph 16 of Consent Decree I contains a corresponding stipulation on behalf of the Secretary of Labor and the Office of Federal Contract Compliance.

practices which the decrees enjoin. Because the plaintiffs believe that the decrees are sufficient to those purposes, they have stipulated that the decrees are *res judicata* with respect to all legal, factual, and remedial issues within the scope of the complaint and the decrees. In other words, the plaintiffs—and we take the parties at their word at oral argument—have merely consented to proceed within the mechanics of the decrees in lieu of filing additional judgments against the defendants with respect to matters covered by the decrees.

Also because they believe that the decrees provide adequate relief, the plaintiffs have agreed that compliance with the decrees shall be deemed compliance with Title VII and Executive Order 11246. Nonetheless, it is our understanding of the submission to this court on behalf of all parties to the decrees that the government remains entirely free, from and after the date of entry, to police the implementation of the decrees for repeated or new violations of the injunctive provisions, and furthermore that the government shall be entitled to treat such suspected violations as *new* violations of Title VII and/or Executive Order 11246, by reason of which the government shall not be barred from bringing the matter to the attention of the district court for new injunctive correction, if necessary. Correspondingly, in light of the parties' stipulation as to the scope of the district court's continuing jurisdiction, we construe paragraph 20 of Consent Decree I as authorizing any aggrieved individual to proceed in similar fashion. If the grievance arises from a transaction or episode to which the injunctive provisions of the decrees apply, then we understand that the individual may approach the court directly.[9] If the grievance involves an allegation of new discrimination occurring subsequent to entry date, then it is our understanding that the individual may file a charge with the EEOC, and/or a lawsuit if he or she chooses, and expect the same quality of administrative and judicial consideration to which an employment discrimination complainant would be entitled in any other American industry.

Having sketched—by no means exhaustively—the terms of the settlement, the parties' interpretation thereof, and our general understanding of what the parties intended by their words and deeds, we turn now to the adversary environment which produced these appeals.

## II. PRIVATE INTERVENTION: COMPLAINTS, PROCEEDINGS, AND APPEALS

The consent decrees were entered on April 12, 1974. By May 17, 1974, three organizations, four individuals, and six groups[10] of plaintiffs in actions pending

9. Of course, the parties to the decrees will encourage the grievant to proceed initially through Implementation and Audit and Review Committee channels, if the grievant seeks systemic relief. Also, that procedure obviously will be the most viable alternative for employees who reside at a distance from the Northern District of Alabama. Yet the decrees themselves—and particularly paragraph 20 of Consent Decree I, see also paragraph 2 of Consent Decree II—are open-ended in that they do not purport to impose administrative exhaustion requirements upon the individual in excess of those otherwise imposed by law. Thus, it is quite reasonable to infer that any obstacles which the individual may encounter en route to any given courthouse must arise by virtue of rules of law or compromises that exist independently of the bare terms of the consent decrees. In any event, with respect to questions concerning any matter resolved by the decrees, the parties thereto have stipulated that the district court may assume jurisdiction on its own motion. Hence, the decrees do not by their own force attempt to inhibit anyone's access to judicial process or the availability of judicial review.

10. The Harris group, certain members of which are the principal appellants herein consists of seven sub-groups, the first of which claims to represent all black employees, past, present, and future, of all defendant companies at plants in which the Steelworkers' Union is the employees' bargaining representative. The next six subgroups claim to represent six private classes in pending actions: Harris, et al. v. Republic Steel Corp., et al., N.D.Ala., C.A. No. 74—P-3345; Ford, et al. v. United States Steel Corp., et al., N.D.Ala., C.A.No. 66-625, *see* note 7, *supra;* Taylor, et al. v. Armco Steel Corp. et al., S.D.Tex., C.A.No. 68-129; Waker, et al. v. Republic Steel Corp., et al., N.D.Ala. C.A.Nos. 71-179, 71-180, 71-181, 71-185; Lane, et al. v. Bethlehem Steel Corp., et al., D.Md., C.A.No. 71-580-H; Rodgers, et al. v. United States Steel Corp., et al., W.D.Pa., C.A.No. 71-793.



before various district courts had moved to intervene and to vacate the decrees. The district court invited the movants to file briefs, offer proof, and make oral arguments at the hearing conducted on May 20. At the conclusion of the hearing, the court narrowed the issues in intervention to two points: (1) whether the decrees should be stayed or vacated as unlawful or improper in their entirety; and (2) the validity of the contemplated releases of claims for additional relief in connection with the payment of back pay to employees so electing under the consent decrees.

The district court granted intervention as of right, intendedly pursuant to § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), and F.R.Civ.P. 24(a)(1), to a group of thirty-six individuals with respect to whom charges of discrimination on the part of the defendants had been filed with the EEOC. Thirty-three of these individuals were members of the Harris group. The court also granted permissive intervention under F.R.Civ.P. 24(b) to the principal officer of the Rank and File Team, an organization composed of rank and file members of the Steelworkers' Union. Judge Pointer denied all other motions for intervention, including that filed by the National Organization of Women (NOW), appellant herein. Among the thirty-six persons as to whom the court allowed intervention by right, however, three were women specifically appointed by NOW at Judge Pointer's request, and represented by NOW's counsel through out the proceedings.[11]

In his memorandum opinion of June 7, 1974, *see* 63 F.R.D. 1, 5, Judge Pointer refused to stay or vacate the consent decrees and upheld their validity against the intervenors' attacks. He determined first that no evidentiary hearing was needed, since the intervenors sought mainly to present legal hypotheses and argument rather than evidence. Next, the court rejected contentions that the government had abdicated or bargained away its responsibilities under Title VII and Executive Order 11246. While recognizing that the decrees may require authoritative construction and clarification from time to time, Judge Pointer deemed such potential difficulties within his control by virtue of the court's continuing jurisdiction. With respect to the alleged illegality of the back pay settlement releases, Judge Pointer defined the issue as "whether a signed release in exchange for the payment of back-pay determined under a settlement procedure, as contemplated in paragraph 18(g) of Consent Decree I, can be valid as a matter of public policy." *Id.* at 7. Relying on recent language by the Supreme Court,[12] he held in the affirmative, provided the employee's consent is both "'voluntary and knowing,'" with "adequate notice which gives the employee full possession of the facts." *Id.*

As a procedural matter, Judge Pointer also relaxed his earlier orders denying intervention to the majority of the movants. The final memorandum of June 7 denies such intervention without prejudice to the rights of private parties to seek further intervention as to questions which may arise in the future. Similarly, whereas Judge Pointer considered his opinion binding upon those to whom he granted intervention as to the issues therein determined, he stated explicitly that he did not consider any private in-

11. On June 4, 1974, Judge Pointer permitted NOW to file an amended complaint in intervention on behalf of the three women, who represented aggrieved classes of former, present, and future female employees of the defendant steel companies. Judge Pointer also received from NOW extensive briefs concerning the effects of the consent decrees upon the rights of females.

12. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 & n. 15, 94 S.Ct. 1011, 1021 & n. 15, 39 L.Ed.2d 147, 160 & n. 15(1974).

tervenor or class of private parties bound by principles of *res judicata* to the consent decrees. *Id.* at 4 n. 2, 5.

[1] NOW appeals the district court's refusal to allow intervention by the organization *qua* organization. It has also filed a brief and presented oral argument on the merits in behalf of the three female appellants to whom Judge Pointer granted intervention. The intervenors from the Harris group appeal the district court's judgment sustaining the overall legality of the consent decrees, although they complain primarily about the back pay features rather than the decrees' injunctive provisions. No other appeals are properly before this court.[13]

For the reasons which follow, we affirm the judgment of the district court insofar as it rejected the contentions of the Harris intervenors and the three females nominated by NOW. We dismiss the appeal of NOW *qua* organization for want of jurisdiction.

## III. DENIAL OF NOW'S MOTION TO INTERVENE

Logical analysis of any question concerning intervention in federal court begins with Rule 24 of the Federal Rules of Civil Procedure.[14] The rule establishes ground rules for two categories of intervention: section (a) establishes the procedures for timely intervention as of right, whereas section (b) recognizes discretion in the district court to permit intervention in two specified situations, again upon timely application.

[2-4] Besides timeliness, Rule 24 details other preconditions to intervention. Under section (a), intervention as of right is authorized (1) when an act of Congress confers an unconditional right to intervene, or (2) when the applicant claims an interest in the subject matter of the action and shows that the action's disposition may, as a practical matter, impair or impede the ability to protect that interest, unless the applicant's interest is adequately protected by other parties to the suit. Thus, (a)(1) intervention presupposes reliance on a statute. By contrast, the inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application. Since 1966, we have consistently held that (a)(2) intervention as of right must be measured by a practical rather than technical yardstick. *E. g.*, Martin v. Travelers Indem. Co., 5 Cir. 1971, 450 F.2d 542, 554; Diaz v. Southern Drilling Corp., 5 Cir. 1970, 427 F.2d 1118, 1123-25, *cert. denied sub nom.*, Trefina A.G. v. United States, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970); Atlantis Development Corp. v. United States, 5 Cir. 1967, 379 F.2d 818, 822-29. A denial of an application for intervention by right which was timely filed, as here, is subject to the usual scope of our appellate review over questions of law. An erroneous denial will be reversed. Weiser v. White, 5 Cir. 1975, 505 F.2d 912, at p. 916. On the other hand, if the appellate court finds that the claim of right to intervene was without merit, then it must dismiss the appeal for want of jurisdiction, since the order denying intervention does not constitute a final judgment. *Id. See also* C. Wright, Federal Courts § 75, at 332 (1970).

[5, 6] The rules pertaining to permissive intervention are slightly different. Rule 24(b) authorizes permissive intervention (1) when a federal statute confers a conditional right to intervene, or (2) when the application raises a question of law or fact which is material to the main action. In exercising its discretion, the district court is required to consider whether permissive intervention would unduly jeopardize or delay the determination of the original suit. On appeal, the denial of a motion for permissive intervention is unreviewable, unless the trial court abused its discretion, Brotherhood of R. R. Trainmen v. Baltimore & Ohio R. R. 331 U.S. 519, 524, 67 S.Ct. 1387, 1390, 91 L.Ed. 1646, 1650 (1947); Martin v. Kalvar Corp., 5 Cir. 1969, 411 F.2d 552. If no abuse of discretion is demonstrated, then once again the district court's order is not appealable and we must dismiss the appeal for want of a final order. Weiser v. White, *supra;* C. Wright, *supra.*

NOW's principal contention asserts an absolute, unconditional right of intervention in favor of the organization. NOW thus seeks to enter the lawsuit under Rule 24(a)(1). NOW argues that this absolute, unconditional right is conferred upon it by § 706(f)(1) of Title VII, as amended, Pub.L.No.92-261, § 4(a) (March 24, 1972), 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(1), which, as pertinent, contains the procedures for filing charges with the EEOC and the filing of lawsuits by the Commission or charging parties when conciliation fails, confers upon the "person or persons aggrieved" a right to intervene in a civil action brought thereunder by the Commission. NOW contends that since it is a civil rights-oriented feminist organization which has been permitted on occasions to file charges with the EEOC on behalf of women, and since on at least one occasion it has been named as a party-plaintiff in a sex discrimination lawsuit,[15] it should therefore be deemed a "person aggrieved" in its own stead. NOW argues that judicial recognition of an unconditional organizational right of

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13. The record reflects that attorneys for the Harris group also listed the National Ad Hoc Committee of Steelworkers, as to which the district court denied intervention, in the Harris intervenors' Notice of Appeal. On appeal, however, the Ad Hoc Committee has filed only a brief as Amicus Curiae, joined by the District 31 Committee to Defend the Right to Strike along with the Rank and File Team. Of the issues briefed by Amici, only those relating to the alleged illegality of the back pay releases have been presented to this court by the briefs of NOW, the three women represented by NOW, and the Harris intervenors. The other issues briefed by Amici were not raised in the district court, and for that reason we shall not consider them. *Cf.* Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc., 5 Cir. 1969, 414 F.2d 872, 876, and cases cited.

14. Rule 24.

Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

15. NOW informs us that is it one of the plaintiffs in a class action employment discrimination suit pending before the federal district court in Maryland, styled Baltimore Chapter of NOW; Cathleen J. Beasley and Catherine N. Lloyd v. Bethlehem Steel Corp., et al., No. M-74-377. Brief for Appellants NOW, et al., at 6. NOW asserts that its filing of charges with the EEOC, for example on behalf of all female employees of United States Steel at Gary, Indiana (Charge No. TCH 4-1985, filed March, 1974), has been instrumental in generating a favorable climate for conciliation and settlement in the steel industry.

intervention would yield socially desirable results, since the organization would receive valuable stature and publicity which would encourage female workers throughout the nation to seek its assistance.

Without drawing any finer distinctions, the district court held that NOW is not a "person aggrieved" within the meaning of §706(f)(1). In the court's view, NOW did not demonstrate a sufficiently concrete interest *qua* organization to justify the additional problems of management and inconvenience to other parties (including, presumably, the beneficiary employees of the consent decrees) that might result from duplicative intervention. The fact that NOW previously had been permitted to designate three female intervenors, whom its counsel ably represented, weighed heavily in Judge Pointer's calculus. See 63 F.R.D. at 4.

[7] While perhaps a court might be persuaded by Judge Pointer's conclusion that NOW is not a "person aggrieved" within the meaning of § 706(f)(1),[16] we defer decision of that question in favor of an approach which we consider more directly dispositive. We hold that this was not a proper case for intervention as of right by any private party or organization pursuant to Rule 24(a)(1). Specifically, we hold that intervention as of right was not conferred in this proceeding by any act of Congress. We do so because it is plain from a careful examination of the government's complaint that this was not in substance a § 706 action, but rather a "pattern or practice" action authorized by § 707, 42 U.S.C. § 2000e-6, which the EEOC was empowered to institute by virtue of the transfer of functions outlined in § 707(c).[17] Insofar as the United States and the Secretary of Labor joined as plaintiffs to enforce the obligations imposed on the defendants by Executive Order 11246, the district court's jurisdiction was based on 28 U.S.C. § 1345.[18]

16. *Cf.* Sierra Club v. Morton, 405 U.S. 727, 740, 92 S.Ct. 1361, 1368-69, 31 L.Ed.2d 636, 646 (1972):

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that.

(footnotes omitted).

*But see* Warth v. Seldin, ..... U.S. ....., ....., 95 S.Ct. 2197, 2211, 44 L.Ed.2d ..... (1975):

> There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties.

In *Warth* the Court described the question of standing as essentially a matter of "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." ..... U.S. at ....., 95 S.Ct. at 2207 (footnote omitted). Note that whereas § 706(f)-(1) of Title VII creates civil actions and rights of intervention in favor of "Person[s] aggrieved," § 703, 42 U.S.C. § 2000e-2, makes it unlawful to discriminate against "any *individual*." (emphasis added).

17. As of March 24, 1974, the EEOC assumed the full range of "pattern or practice" functions which had belonged to the Justice Department since the effective date of Title VII, July 2, 1965. Accordingly, NOW appears to accept as correct our statement in the text, that this was a § 707 "pattern or practice" action. Brief for Appellants NOW, et al., at 6.

18. 28 U.S.C. § 1345: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." *See* United States v. Local 189, United Papermakers, E.D.La. 1968, 282 F.Supp. 39, 43, *aff'd*, 5 Cir. 1969, 416 F.2d 980, *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).



[8, 9] Nothing in § 707 or in any other federal statute conferred an unconditional right of intervention upon any private individual or association thereof. The "pattern or practice" action under § 707, which is conspicuously silent in regard to intervention, must be carefully contrasted with the actions contemplated by § 706. Under § 707, the EEOC (formerly the Attorney General) may institute a "pattern or practice" suit anytime that it has "reasonable cause" to believe such a suit necessary. *See* United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, 438, *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972). Section 707 does not make it mandatory that anyone file a charge against the employer or follow administrative timetables before the suit may be brought. It was unquestionably the design of Congress in the enactment of § 707 to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals. *See* Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, at p. 66; United States v. International Ass'n. of Bridge, Structural, and Ornamental Iron Workers, 7 Cir. 1971, 438 F.2d 679, *cert. denied* 404 U.S. 830, 92 S.Ct. 75, 30 L.Ed.2d 60 (1971). Rather, it is to those individual grievances that Congress addressed § 706, with its attendant requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded the respondent when "reasonable cause" has been found. On the other hand, the mere fact that some charges were filed, or that efforts were made toward conciliation, does not in our view transform what the government may properly bring and does bring as a § 707 "pattern or practice" action into a § 706 action. *See* United States Ironworkers Local 86, 9 Cir. 1971, 443 F.2d 544, 551-52, *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

We have studied closely the language of the two sections in reaching the foregoing conclusions. If only the words of the statute were available, one might plausibly argue that § 707(e), 42 U.S.C. § 2000e-6(e), incorporates § 706(f)(1) intervention as of right into "pattern or practice" procedure. Section 707(e), enacted as another of the 1972 amendments to Title VII, provides that the EEOC shall have the authority, subsequent to March 24, 1972, "to investigate and act on" charges of pattern or practice discrimination filed in behalf of aggrieved individuals. Section 707(e) concludes: "All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 [§ 706] of this title."

[10] Arguably, these procedures include intervention as of right by aggrieved parties. The legislative history indicates otherwise, however, and in the absence of an express provision for intervention we choose to follow its signals. In the first place, we have discovered no legislative history evincing a favorable congressional attitude toward unconditional private intervention in government "pattern or practice" litigation. In the legislative history which speaks most closely to the point, the House Committee on Education and Labor described the enacted precursor to § 707(e) as a measure which merely "[a]ssimilate[d] procedures for new proceedings brought under Section 707 to those now provided for under Section 706 so that the Commission may provide an *administrative procedure* to be the counterpart of the present Section 707 action." (emphasis added).[19] Thus, while Congress apparently intended that the EEOC have investigative and conciliatory authority in "pattern or practice" situations comparable to its existing powers in § 706 cases, there is no indication that Congress intended the duplication of procedures to extend beyond the administrative level. The EEOC, of course, may not enact statutes, and it is a statute that Rule 24(a)(1) requires.

19. H. Rep. No. 92-238, reporting H.R. 1746, 92d Cong., 2d Sess., 1972 U.S.Code Cong. & Admin.News 2137, at 2164 (reporting § 707(f) of H.R. 1746).

[11] We emphasize that our disposition of the 24(a)(1) aspect of the intervention question is based primarily on what we find to be the correct construction of § 707 and its legislative history. We are comforted, however, by the Seventh Circuit's recent decision in EEOC v. United Air Lines, 7 Cir. 1975, 515 F.2d 946, in which the court reached the same conclusion, though ultimately its affirmance was based on the untimeliness of the intervenors' application. Also, we find persuasive support for our refusal to effectively imply an unconditional statutory right in the strong judicial policy against nonexpress private intervention in government enforcement litigation when an adequate private remedy is freely accessible. *See, e.g.*, Sam Fox Publishing Co. v. United States, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961). *See also* Battle v. Liberty Nat'l. Life Ins. Co., 5 Cir. 1974, 493 F.2d 39, 52, *cert. denied*, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975). This policy likewise applies to applications for intervention by right under Rule 24(a)(2), and applications for permissive intervention under Rule 24(b). *See* SEC v. Everest Mgt. Corp., 2 Cir. 1972, 475 F.2d 1236; United States v. Automobile Mfrs. Assn., C.D. Cal.1969, 307 F.Supp. 617, 619, *aff'd per curiam*, 397 U.S. 243, 90 S.Ct. 1105, 25 L.Ed.2d 280 (1970). *Cf.* NAACP v. New York, 413 U.S. 345, 368, 93 S.Ct. 2591, 2604, 37 L.Ed.2d 648, 664 (1973).

Without any aim on our part to denigrate whatever social benefit may accrue from participation in the proceedings by organizations such as NOW, or to impugn NOW's motives or sincerity, we note that NOW has offered no commanding legal or policy arguments to warrant a rule allowing its intervention as of right. NOW places much reliance on EEOC v. American Tel. & Tel. Co., E.D.Pa. 1973, 365 F.Supp. 1105, *aff'd in part, appeals dismissed in part*, 3 Cir. 1974, 506 F.2d 735. There the court granted intervention by right, under § 706(f)(1) and Rule 24(a)(1), to a labor union insofar as certain issues raised in the union's application related to grievances with respect to which charges had been filed with the EEOC, and to remedy which the Commission had filed a suit that led to an industry-wide consent decree. *American Tel. & Tel.*, however, was a suit brought by the Commission pursuant to § 706. It was not a § 707 "pattern or practice" action. *See* 506 F.2d at 740. The issue before the court was whether the union could be considered an "aggrieved" party for purposes of § 706(f)(1). The case is not authority for the proposition sought to be established *sub judice*. At any rate, we think that a labor union which is party to the collective bargaining agreement presents a far stronger case for intervention than does an organization such as NOW, provided that conflicts of interest are minimized.[20]

[12] In summary, we have determined that NOW enjoyed no unconditional statutory right to intervene under F.R.Civ.P. 24(a)(1). The matter is

20. A labor union is elected to represent in collective bargaining the employees who depend on the company for their jobs and livelihood. When the company, as in *American Tel. & Tel.*, enters into a settlement with the government in an effort to resolve complaints of alleged employment discrimination, the union derivatively acquires a mandatory duty to negotiate alternatives to the provisions—e.g., those relating to seniority, or as in the Bell case pregnancy leave—of the existing collective bargaining contract. If the settlement contains features the legality or propriety of which is questionable, then the union may have a definite, cognizable interest *qua* union in contesting those features. *Cf.* Kilberg, *Current Civil Rights Problems ii the Collective Bargaining Process: The Bethlehem and AT&T Experiences*, 27 Vand.L.Rev. 81, 101, 106 (1974). Furthermore, the union's ability to protect its interest may well be impaired or impeded if it is not allowed to intervene in the settlement formalization proceedings. *Id.* At the very least, it would be anomalous to assume in such cases that the employees' bargaining representative's interest is adequately served by the government or the employer. Nevertheless, the union must carefully tailor its role in intervention in order not to unduly favor or discriminate against the interests of particular segments of its membership. *See* EEOC v. American Tel. & Tel. Co., 3 Cir. 1974, 506 F.2d 735, 741.



mostly ended at this point, but we pause briefly to consider whether the district court could have erred in refusing to grant NOW intervention under Rule 24(a)(2) or (b). With respect to (a)(2) intervention as of right, NOW obviously claims an interest in the subject matter of the action. We believe, however, that NOW fails the other two prongs of the test. NOW has not shown that the district court's decision to enter the consent decrees as between the government and the defendants may, as a practical matter, operate to impair or impede the protection of its interest. Neither NOW nor any of its members is bound by *res judicata* or estoppel to the consent decrees. *See* Rodriguez v. East Texas Moto Freight, 5 Cir. 1974, 505 F.2d 40 at p. 65; Williamson v. Bethlehem Steel Corp., 2 Cir. 1972, 468 F.2d 1201, 1203, *cert. denied*, 411 U.S. 931, 93 S.Ct. 1893, 36 L.Ed.2d 390 (1973). *See also* Sam Fox Publishing Co. v. United States, *supra*, 366 U.S. at 689-90, 81 S.Ct. at 1313, 6 L.Ed.2d at 609. Furthermore, the district court explicitly qualified the denial of intervention as a denial *without prejudice* to future intervention. *Cf.* NAACP v. New York, *supra*. Finally, plenary legal remedies remain fully available to NOW's membership and perhaps, or so NOW has asserted, to the organization itself.[21] The policy against private intervention in government litigation, noted *supra*, militates against the allowance of (a)(2) intervention here; NOW makes no colorable showing of inadequacy in the government's representation of the public interest. In any event, NOW fails the third element of the (a)(2) test. Having participated through its nominees and counsel during these entire proceedings, NOW cannot be heard to complain of the adequacy of the feminist representation.

21. For that reason, NOW's reliance on cases such as Trbovich v. UMW, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972), is misplaced. *Trbovich* was an action by the Secretary of Labor under § 482(b) of the LMRDA, 29 U.S.C. § 401 *et seq.*, to set aside a union's election of officers because of alleged violations of Title IV of the Act, § 481 *et seq.* The statute provided that the suit by the Secretary constituted the exclusive remedy, and union members are barred by law from bringing private actions. Since the Secretary thus functioned as the union members' only advocate for the protection of their valuable rights against the union, and because the Secretary's corresponding and potentially conflicting duty to consider the broader public interest, the Court held that the union member who filed the original complaint with the Secretary was entitled to limited intervention under Rule 24(a)(2). Here, by contrast, although the government was obliged to represent the public interest, the consent decrees do not purport to affect the availability of relief from employment discrimination through private actions under Title VII, the Civil Rights Act of 1866 (42 U.S.C. § 1981), the labor law duty of fair representation, or any other applicable federal law. *Compare* Hodgson v. UMW, 1972, 153 U.S. App.D.C. 407, 473 F.2d 118, 122 n. 15, 128-30 (suit by Secretary under Title III of LMRDA is *res judicata* as against union members; Rule 24(a)(2) intervention allowed).

Also to be distinguished are cases such as Atlantis Development Corp. v. United States, 5 Cir. 1967, 379 F.2d 818 (title to property); Martin v. Travelers Indem. Co., 5 Cir. 1971, 450 F.2d 542 (liability insurance coverage); and Nuesse v. Camp, 1967, 128 U.S.App.D.C. 172, 385 F.2d 694 (conflict between federal banking laws and state law), in which courts have granted (a)(2) intervention because of the practical disadvantages that would follow from peculiar *stare decisis* effects, if intervention were not allowed. Again contrasting this case, we have difficulty conceiving of how the consent decrees—products of negotiation rather than contested litigation—are likely to carry *stare decisis* effects measurably adverse to NOW or its membership in any future proceeding. A careful analysis of the decrees demonstrates that such an assumption would be not only quite premature, but also naively critical of the perceptive abilities of the judiciary. *See* Judge Motley's lucid discussion in Leisner v. New York Tel. Co., S.D.N.Y.1973, 358 F.Supp. 359, 369-70. *Cf.* Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 221 n. 21; Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, at p. 65; Dickerson v. United States Steel Corp., E.D.Pa.1974, 64 F.R.D. 351.

In no respect does this case bear genuine resemblance to the kind of bizarre problems encountered in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967). *See* Kaplan, *Continuing Work of the Civil Committee:* [etc.] *(I)* 81 Harv.L.Rev. 356, 405-06 (1967).

[13, 14] Insofar as NOW's application may be deemed to have sought permissive intervention under Rule 24(b), no abuse of discretion has been shown in the denial. The district court was clearly justified in determining that the interests of the majority of the affected individuals predominated over NOW's interest in further delaying implementation of the decrees' reforms. Such determinations must be viewed in light of the circumstances as they existed at the time. EEOC v. United Air Lines, *supra*, 515 F.2d at 949. In this case, a full hearing had been held and NOW had received ample opportunity to present its arguments. The court below did not err in denying further intervention. Consequently, NOW's appeal *qua* organization must be dismissed.[22]

## III. THE APPEALS ON THE MERITS: CHALLENGES TO THE CONSENT DECREES

### A. *Scope of Review*

[15] Before proceeding with our examination of the appellants' numerous and provocative challenges to the consent decrees, it is appropriate that we outline the rules of law which govern the parameters of our review. Initially, it cannot be gainsaid that conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes. As early as 1968, Judge Bell wrote for this court: "It is thus clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices *without litigation.*" Oatis v. Crown Zellerbach Corp., 5 Cir. 1968, 398 F.2d 496, 498 (emphasis added). Subsequently, in Dent v. St. Louis-San Francisco Ry. Co., 5 Cir. 1969, 406 F.2d 399, 402, Judge Coleman advanced the same thesis:

> Thus it is quite apparent that the basic philosophy of these statutory provisions is that *voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by conciliation both before and after court action.*

(emphasis added). In Culpepper v. Reynolds Metals Co., 5 Cir. 1970, 421 F.2d 888, 891, we declared that "the central theme of Title VII is 'private settlement' as an effective end to employment discrimination," citing *Oatis*. Next, in Hutchings v. United States Industries, Inc., 5 Cir. 1970, 428 F.2d 303, 309, Judge Ainsworth stated:

> [I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation (citing *Oatis*) on the ground that voluntary compliance is preferable to court action. (citing *Dent*). *Indeed, it is apparent that the primary role of the EEOC is to seek elimination of unlawful employment practices by informal means leading to voluntary compliance.*

(emphasis added).[23]

Our recent excursions into this area have not detoured from the foregoing principles, but have emphasized instead their practical value. In the most sweeping of all our employment discrimination decisions, Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d

22. Although we have determined that intervention as of right under F.R.Civ.P. 24(a)(1) was not available to the private parties and groups who sought intervention in this case, some of whose applications were granted below on the assumption that § 706(f)(1) of Title VII conferred such right, we proceed nonetheless to consider the merits of the attacks lodged against the consent decrees by the remaining intervenors-appellants. We do so on the assumption that the district court, having concluded that certain parties ought to be granted intervention either by right or by permission, would have allowed those parties to intervene in any event under either 24(a)(2) or (b). No appellee has suggested by way of cross-assignment or otherwise that we should not go forward to the merits.

23. *Accord*, Guerra v. Manchester Terminal Corp., 5 Cir. 1974, 498 F.2d 650; Airline Stewards and Stewardesses v. American Airline Stewards and Stewardesses v. American Airlines, Inc., 7 Cir. 1972, 455 F.2d 101, 109; Fekete v. United States Steel Corp., 3 Cir. 1970, 424 F.2d 331, 336; Bowe v. Colgate-Palmolive Co., 7 Cir. 1969, 416 F.2d 711; Jenkins v. United Gas Corp., 5 Cir. 1968, 400 F.2d 28.



211, 258, we said in regard to the firmly established, but nonetheless thorny and speculative matter of awarding classwide back pay:

> Initially, we approve the district court's intention of referring the back pay claims to a Special Master, Fed.R. Civ.P. 53. United States v. Wood, Wire & Metal Lathers Int. Union, Local 46, 328 F.Supp. 429, 441 (S.D.N.Y.1971). *However, the court and the parties may also consider negotiating an agreement. E.g.*, Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3, 18 (S.D.Tex.1972), 491 F.2d 1364 (5th Cir. March 27, 1974); United States v. Wood, Wire & Metal Lathers, Int. Union, Local 46, *supra* 328 F.Supp. at 444 n. 3. *An alternative is to utilize the expertise of the intervening Equal Employment Opportunity Commission to supervise settlement negotiations or to aid in determining the amount of the award.*

(emphasis added).

Nor has the Supreme Court maintained detached silence in regard to the deference courts should accord the processes of voluntary conciliation and settlement. Describing Title VII and the functions of the EEOC, Mr. Justice Powell in Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 1017-18, 39 L.Ed.2d 147, 156 (1974), wrote for the Court:

> Cooperation and voluntary compliance were selected as *the preferred means* for achieving [the elimination of unlawful employment discrimination]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby State and local equal employment opportunity agencies, as well as the Commission, would have *an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.* In the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority *to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.*

(emphasis added). In *Gardner-Denver* the Supreme Court stressed the importance of voluntary settlement in voicing its disapproval of a policy of deferral to binding arbitration. In the Court's view, such a policy could adversely affect the arbitration system as well as the vindication of individual rights, since the employee—fearful of the arbitral forum—might elect to bypass arbitration and file a lawsuit instead. *"The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less."* 415 U.S. at 59, 94 S.Ct. at 1025, 39 L.Ed.2d at 164. (emphasis added).

So far, we have emphasized only one side of the coin—the side which places a premium on the achievement of voluntary compliance. In doing so, we have not overlooked that the "final responsibility for enforcement of Title VII is vested with federal courts," *Gardner-Denver, supra*, 415 U.S. at 44, 94 S.Ct. at 1018, 39 L.Ed.2d at 156, and that "Congress gave private individuals a significant role in the enforcement process of Title VII." *Id. See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).[24] Nor have

24. Statements to the same effect may be found in virtually in all of the cases which we have canvassed in stressing the importance of conciliation and settlement, and in legion others as well. *See, e.g.*, Gamble v. Birmingham Southern R. R., 5 Cir. 1975, 514 F.2d 678, at p. 686. To repeat the citations would be superfluous in view of the Supreme Court's repeated and emphatic recognition of the important enforcement role played by private suitors.

we forgotten that "the private right of action remains *an* essential means of obtaining judicial enforcement of Title VII." *Gardner-Denver*, *supra*, 415 U.S. at 45, 94 S.Ct. at 1018, 39 L.Ed.2d at 156 (emphasis added), and cases cited. We are fully mindful, moreover, that the EEOC's limited resources permit it to undertake serious conciliation or lawsuits in only a small fraction of the cases on its docket.[25] For that reason, the congressional scheme continues to depend in substantial measure upon "private attorneys general" who, through their lawsuits in the federal courts, elicit enunciation of the great bulk of policies and principles which serve to flesh out the basic congressional mandate.

Yet we deal here with one of those rare instances in which the government has, to its satisfaction, successfully negotiated a comprehensive voluntary accord. At least ostensibly, the government has done precisely what it ought to do as a matter of public policy in order to vitiate the need for additional industry-wide litigation. On the other hand, the product of the considerable efforts on behalf of the government, the steel companies, and the union does not purport to foreclose any alternatives that may otherwise exist for individuals who had rather litigate than participate in the entire settlement.[26] We

25. According to one fairly recent source, the EEOC—to no one's surprise—"suffers from a considerable work backlog." It is reported that as of June 30, 1971, some 32,000 cases were backlogged, and that the processing of a charge may consume eighteen to twenty-four months. Further, after the EEOC finds reasonable cause, another six months usually passes before it seeks conciliation.

In fiscal 1972, the last year prior to implementation of the 1972 amendments which gave the EEOC power to sue, the Commission found reasonable cause to assert unlawful discrimination against only 1,390 employers. Settlement was attempted to some degree with 792 of these employers, but only 268 attempts resulted in a partial or complete success. Note, *The Tentative Settlement Class and Class Action Suits Under Title VII of the Civil Rights Act*, 72 Mich.L.Rev. 1462, 1463 n. 11, 1464 n. 17 (1974).

Another source reports that as of the close of fiscal 1974, the EEOC's backlog had grown to nearly 98,000 charges. 181 BNA—DLR—D-1, 5 (Sept. 17, 1974).

26. In this respect, the consent decrees present a situation somewhat analogous to that recently examined by the Supreme Court in Johnson v. Railway Express Agency, Inc., ..... U.S. ....., 95 S.Ct. 1716, L.Ed.2d 295 (1975). In *Johnson* it was argued that the timely filing of an employment discrimination charge with the EEOC, pursuant to Title VII, should be held to toll the applicable state statute of limitations for a suit under 42 U.S.C. § 1981 on the same cause of action. Rejecting the argument, the Supreme Court reiterated the theme of *Gardner-Denver* that the various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true." ..... U.S. at ....., 95 S.Ct. at 1720, 44 L.Ed.2d at .....

The most significant feature about *Johnson* is its emphasis on the principle that the choice over which way to proceed belongs to the grievant:

> Petitioner argues that a failure to toll the limitation period in this case will conflict seriously with the broad remedial and humane purposes of Title VII. Specifically, he urges that Title VII embodies a strong federal policy in support of conciliation and voluntary compliance as a means of achieving the statutory mandate of equal employment opportunity. He suggests that failure to toll the statute on a § 1981 claim during the pendency of an administrative complaint in the EEOC would force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance.
>
> We have noted this possibility and, indeed, it is conceivable, and perhaps almost to be expected, that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding. (footnote omitted). * * But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against employment discrimination separate from and independent of the more elaborate and time consuming procedures of Title VII.



say *entire* because the injunctive relief provided by the consent decrees extends to all affected steelworkers, regardless whether they elect to accept the back pay and execute the releases. The question at this point, then, is through what lens do we judge the adequacy of the settlement as against the intervenors' objections, bearing in mind that Congress and the Supreme Court have expressed a preference for voluntary compliance above all other tools of enforcement?

We think the answer was delivered nearly fifteen years ago by Judge (now Chief Judge) Brown in Florida Trailer and Equipment Co. v. Deal, 5 Cir. 1960, 284 F.2d 567, in which an objecting creditor sought to void a referee and district court-approved settlement, reached pursuant to the Bankruptcy Act, between the trustee of the insolvent estate and a lien creditor. There we stated:

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise.

284 F.2d at 571. Judge Brown continued:

> Obviously, it would not be a settlement if to obtain approval the Trustee would have to demonstrate that he could not succeed had the preference claim been pressed. *All that he must do is establish to the reasonable satisfaction of the Referee that, all things considered,* (citation omitted), *it is prudent to eliminate the risks of litigation to achieve specific certainty though admittedly it might be considerably less (or more) than were the case fought to the bitter end.* * * *

*Id.* at 573 (emphasis added).

Despite the appearance of an occasional contextual gloss,[27] the approach to judicial evaluation of proposed settlements announced in *Deal* has drawn firm adherents among the federal courts. *See* City of Detroit v. Grinnell Corp., 2 Cir. 1974, 495, F.2d 448, 455-56 (objectors must show clear abuse of discretion in trial court's approval of settlement); Bryan v. Pittsburgh Plate Glass Co., 3 Cir. 1974, 494 F.2d 799, 803, *cert. denied*, Abate v. Pittsburgh Plate Glass Company, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d

..... U.S. at ....., 95 S.Ct. at 1722, 44 L.Ed.2d at ..... Likewise in this case, individual employees will find themselves faced with the choice whether to timely accept back pay under the consent decrees, for which no litigation will be necessary, or file private charges and/or lawsuits and risk the usual litigatory uncertainties in quests for greater recoveries. We know of no policy or rule of law, however, which forbids the erection of such a choice when its effect is to leave the individual grievant in a position no worse, but in fact better, than that occupied in the absence of the settlement, which, of course, is not binding on the individual unless he or she so desires.

27. *E.g.*, West Virginia v. Chas. Pfizer & Co., S.D.N.Y.1970, 314 F.Supp. 710, 740 *aff'd*, 2 Cir. 1971, 440 F.2d 1079, *cert. denied, sub nom.*, Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971) ("fair, reasonable and adequate"); McCray v. Beatty, D.N.J.1974, 64 F.R.D. 107, 110 (court "would not approve a settlement that appeared inequitable or unfair to any party to the suit").

146 (1974) (settlement not unfair simply because many class members oppose it); Greenspun v. Bogan, 1 Cir. 1974, 492 F.2d 375, 381 (only where one side is so clearly correct that offer in compromise becomes clearly unreasonable does trial court abuse discretion in approving settlement); Ace Heating & Plumbing Co., Inc. v. Crane Co., 3 Cir. 1971, 453 F.2d 30, 34 (great weight is accorded the trial judge's views); West Virginia v. Chas. Pfizer & Co., 2 Cir. 1971, 440 F.2d 1079, 1085-86, *cert. denied*, see footnote 27, *supra*, (appellate court will disturb settlement approval only upon clear showing of abuse of discretion). *See also* Young v. Katz, 5 Cir. 1971, 447 F.2d 431.

Applying the *Deal* approach to the issues before us, we align ourselves with certain propositions which were recently developed by the Second Circuit in its review of a similar, though less expansive, Title VII settlement, *see* Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity, 2 Cir. 1975, 514 F.2d 767. In the first place, the scope of our review is narrow and we should interfere with the implementation of the consent decrees only upon a clear showing that the district judge abused his discretion by approving the settlement. Next, to the extent that the settlement may in occasional respects arguably fall short of immediately achieving for each affected discriminatee his or her "rightful place," we must balance the affirmative action objectives of Title VII and Executive Order 11246 against the equally strong congressional policy favoring voluntary compliance. The appropriateness of such balancing is especially clear, as here, "in an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals." 514 F.2d at 771. Nor should we substitute our notions of fairness and adequacy of the relief for those of the parties and Judge Pointer, absent a strong showing that the district court failed to satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest. Finally, and of utmost importance, we are without authority to modify or rewrite the parties' agreement. Our only alternative, if it were shown that Judge Pointer abused his discretion or overlooked an illegal provision, would be to vacate his approval of the entire settlement, and remand for trial of the government's "pattern or practice" compliant. *See* United States v. Atlantic Ref. Co., 360 U.S. 19, 23, 79 S.Ct. 944, 946, 3 L.Ed.2d 1054, 1057 (1959); *Patterson, supra*, 514 F.2d at 772. *Cf.* United States v. Blue Chip Stamp Co., C.D.Cal. 1967, 272 F.Supp. 432, 440, *aff'd per curiam sub nom.*, Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580, 88 S.Ct. 693, 19 L.Ed.2d 781 (1968).

To the foregoing observations we add a few remarks which we think are particularly pertinent to these appeals. The central issue here is not whether the consent decrees achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation. The question which we must decide is whether the responsible government agencies may lawfully conciliate and settle by consent decree charges of discrimination cutting across an entire industry in a manner which assures cooperative defendants that they will not face future government lawsuits on those claims, and which accords the defendants the opportunity to offer final satisfaction to aggrieved individuals who are willing to accept tenders of back pay and execute the releases. Throughout their arguments, the appellants imply that private suits by thousands of unspecified employees whose grievances are generally covered by the decrees would be virtually certain to achieve far better results than those obtained by the government. Yet this implication, stripped of its rhetoric, goes really only to back pay insofar as the Harris appellants are concerned. Those appellants have challenged seriously the adequacy of the decrees' injunctive measures neither in the district court nor in this court.[28] Only the three female appellants have done so, and their contentions—though they certainly suggest possibilities—do not approach any stretch of certainty. Against the overwhelming speculative advantage that might accrue to a small number of aggrieved persons if the decrees were vacated must be weighed the certain loss to all of the immediate injunctive benefits and the unimpeded opportunity to receive some back pay today—instead of after months or years of litigation. Additional losses which must be considered include the nation's investment in the resources consumed by the federal agencies in negotiating these decrees, as well as the chance justly to finalize a matter that otherwise would burden agencies and courts and continue to disrupt an industry vital to the nation's security for years to come. We proceed now to examine specific issues raised by the appellants.



* * *

E. *Lack of Prior Notice*

The final contention raised by all appellants is that the decrees should be invalidated on the ground that interested private parties and their counsel were not invited to participate in pre-decree negotiations, nor were they given advance formal notice and opportunity to intervene prior to entry of the decrees by the district court. To eliminate much confusion at the outset, we repeat that we are concerned with a consent judgment between agencies of the federal government, nine steel companies, and a union. This judgment, in the form of an industry-wide settlement of disputes relating to employment discrimination, was reached after months of conciliations among the parties and the filing of an undisputedly proper § 707 "pattern or practice" complaint by the government. To the extent appellants believe that the absence of prior notice and opportunity to intervene abridged an unconditional right of intervention, that belief should be dispelled by part II of our opinion, *supra*.

Moreover, we know nothing in §

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28. The extremely dubious validity of the appellants' implication is highlighted by certain examples. Although Title VII had been in effect almost nine years at the time of the consent decrees' entry, private actions had been instituted at no more than a dozen of the 250 plants covered by the decrees. Of these private actions, only one had proceeded to final judgment, the Fairfield Works case, *see* note 7, *supra*. In that case sweeping injunctive reforms were ordered and implemented, but the district court denied back pay to the overwhelming majority of aggrieved steelworkers. Whereas the consent settlement extends offers of back pay to all production and maintenance minority employees hired before 1968 and all female employees hired before the date of the decrees, the back pay awarded in the Fairfield case was limited to sixty-one blacks hired before 1963.

Furthermore, the Fairfield order provided affirmative relief only to blacks. The consent decrees provide such relief to females and Spanish-surnamed Americans as well. Consent Decree II, for example, establishes as an interim affirmative goal that twenty percent of all new hires in production and maintenance departments shall be females.

Also, the order in Fairfield provided for rate retention only to blacks who transferred within three years of the date of the order. Consent Decree I creates a rate retention remedy which applies to all female and minority employees with plant seniority as of January 1, 1968, and who may wish to transfer at any time in the future. The rate retention in Fairfield lasted for only one year following transfer; the retention period under Consent Decree I continues for up to two years.

Finally, the time factor alone is illuminating as it surfaces in these cases. It took six months to try the Fairfield suit. The relief eventually ordered there is no more impressive than the reforms which were hammered out by the government, the steel companies, and the union during six months of negotiations. If we consider back pay, then the Fairfield relief per capita is far less than under the decrees. The appellants here do not dispute the steel companies' estimate that if an equivalent amount of time were used to litigate the issues at each of the 250 plants covered by the decrees, it would take at that rate ten years to try just the *liability* issues. If after trial the back pay issues were referred to a special master for individualized computations, including lack of qualification, voluntary freezing, refusal to bid, and physical fitness, and if one hour were allotted each of 60,000 claimants, over twenty-eight years of trial time could be consumed. Brief for appellee steel companies at 11 n. 14.

707 or in any other statute, order or regulation which suggests that the parties *must* permit private individuals to participate in their conferences before the government may finalize a "pattern or practice" consent decree. *Cf.* Hadnott v. Laird, 1972, 149 U.S.App.D.C. 358, 463 F.2d 304, 308. For reasons explained heretofore, private parties do not rise and fall on the outcome obtained by the government. "In short, the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree." United States v. Borden Co., 347 U.S. 514, 519, 74 S.Ct. 703, 706, 98 L.Ed. 903 (1954). As a matter of policy, we think it highly doubtful that participation in "pattern or practice" conciliations by everyone who so desired would serve either the public interest or the interests of minority and female employees.[77] The remarkable feature of the present decrees is that so many self-interested parties were able to leave so few unresolved remedial issues. The major concessions yielded by the defendants could have been obtained only by all parties to the negotiations working together unselfishly toward a settlement keyed to broader public goals. If a multitude of intervenors and representatives of private individuals with conflicting personal interests had participated in the framing of the decrees, then probably no comparable industry-wide agreement could have been reached.

The Appellants' demand for notice and hearing prior to judicial approval of the consent decrees is not well taken. Assuming *arguendo* that the 1972 amendments to Title VII did not affect the capacity of private persons to maintain a "pattern or practice"-type cause of action,[78] we do not think that appellants were indispensable parties.[79] No bona fide contention is made that appellants' joinder was essential to fashioning a complete, final, and enforceable judgment as between the government and the defendants. *See* Advisory Committee Note, 1966 Amendments to F.R. Civ.P. 19. Furthermore, as we have reiterated throughout, every appellant and every employee whom appellants purport to represent retains his or her private right of action in its entirety.[80] Obviously, the nonjoinder of appellants and all other minority and female steelworkers subjects each defendant to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Quite arguably, however, that is a risk Congress intended to impose. Without a doubt it is one which the defendants are willing to incur. In any case, the appellants have neither identified all of the persons whom they would have the court join as plaintiffs, nor did they present any evidence concerning the physical feasibility of such joinder. We conclude that the district court did not abuse any principles of "equity and good conscience" in proceeding as it did, especially in view of the drastic and disfavored remedy of dismissal which is dictated by Rule 19 where indispensability is inescapable. *Cf.* United States v. Masonry Contractors Assn., *supra*, 497 F.2d at 875. Note also that the district court took special care in the "shaping of relief," F.R.Civ.P. 19(b), to avoid prejudice with respect to future intervention, even by persons who already had been allowed to intervene, in the event additional questions arise concerning the decrees in operation. 63 F.R.D. at 4 n. 2, 5. This procedure may well prove to be more useful over the life of the decrees than would a single opportunity for a contest preceded by formal notice to all interested individuals, assuming such notice were physically and fiscally possible.

Actually, any further consideration of appellants' theory in terms of joinder of parties becomes hopelessly distorted and unproductive. It appears to us—though again the argument is utterly vague and conclusory[81]—that their real objective is to convert what began as a government "pattern or practice" suit into an eventual F.R.Civ.P. 23 class action. Under Rule 23(a) one or more members of a class may initiate a class action when, *inter alia*, "(1) the class is *so numerous that joinder of all members is impracticable* . . . ." (emphasis added). This criterion is consistent with the scope in which appellants purport to prosecute these appeals: "Appellants intervened for the express purpose of assuring that all aggrieved employees, to the extent practicable, were given adequate notice and an opportunity to be heard prior to final

77. Citing a policy of the Department of Justice under which proposed antitrust consent decrees are made public for "comment or criticism" thirty days prior to entry, appellants ask us to order the EEOC and Department of Labor to adopt a similar policy for Title VII—Executive Order 11246 consent decrees. Appellants assert that we have the necessary authority by virtue of our general supervisory appellate jurisdiction. Perhaps appellants are correct, but we decline at this time to so order the agencies. The issue is not fully briefed, and our reluctance is based on an exercise of discretion. The appellants' idea, however, may deserve serious consideration by the appropriate departments of government.

78. At least one court has rejected the contention that the amendments narrowed the permissible scope of private Title VII actions instituted subsequent thereto. *See* Dickerson v. United States Steel Corp., *supra*, 64 F.R.D. at 359-60 (by vesting EEOC with power to sue, Congress intended to supplement, rather than supplant, existing remedies.)

79. F.R.Civ.P. 19:

*Rule 19.*
*Joinder of Persons Needed for Just Adjudication*

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the value of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

80. This follows from the rule that the judgment in a government "pattern or practice" action simply does not bind private individuals, unless they voluntarily choose to become parties to it. *See* note 38, *supra*.

Hence, we also fail to see how the consent decrees "raise difficult questions under . . . the Due Process Clause." Brief for Appellants Harris, et al., at 87. Specifically, we cannot conceive of how the decrees operate as an "adjudication" of appellants' rights, or how their terms may deprive the appellants of life, liberty, or property—particularly when, as we have determined, no private person has a "right" to advancement of his or her specific claim in litigation brought by the government in court in a capacity comparable to attorney and client. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865, 872 (1950). *See also* our discussion of paragraphs C and 19, *supra*.

81. Brief for Appellants Harris, et al., at 87.

approval of the Decrees;"[82] and: "National Organization for Women, Inc., Present and Former Female Employees of Defendant Companies."[83]

[49] We need not delve into a labyrinthian search for the answer to whether the district court somehow erred in failing to certify the proceedings below as a class action before finally entering the decrees, for no one has briefed or argued the point in exactly those terms. Yet we find both ironic[84] and puzzling the apparent assumption that class action treatment necessarily would have yielded the results sought by appellants. In the context of Title VII and employment discrimination generally, such actions today are conducted typically pursuant to F.R.Civ.P. 23(b)(2), which presupposes allegations that the defendant has acted or refused to act in a manner hostile to the group, thus making declaratory or injunctive relief appropriate in favor of the entire class, if warranted by the evidence.[85] The (b)(2) class is by definition a cohesive aggregate, and hence its members are said to be bound by a "superior" *res judicata* effect. *See* Wetzel v. Liberty Mutual Ins. Co., 3 Cir. 1975, 508 F.2d 239, cert. denied ..... U.S. ....., 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975); LaChapelle v. Owens-Illinois, Inc., 5 Cir. 1975, 513 F.2d 286, 288 n. 7 ((b)(2) members may not "opt out"); 3B. J. Moore's Federal Practice ¶23.31[1], at 23-526-27 (1974). Thus, unlike the 23-(b)(3) "common question" class action (most frequently utilized in suits for money damages), as to which Rule 23-(c)(2) requires individual notice to the fullest practicable extent, Rule 23 contains no specific notice requirement for (b)(2) actions.[86]

Even so, in connection with awards of classwide back pay we have suggested that *some* form of notice should be distributed in order to overcome "the problem of binding unidentified class members." *Pettway, supra,* 494 F.2d at 257. But experience teaches that such notice may come late in the litigation. *Id.* Moreover, in view of Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n. 14, 94 S.Ct. 2140, 2152 n. 14, 40 L.Ed.2d 732, 742 n. 14 (1974), and Sosna v. Iowa, 419 U.E. 393, 396 n. 4, 95 S.Ct. 553, 556 n. 4, 42 L.Ed.2d 532, 539 n. 4 (1975), we must approach skeptically the notion that such notice must issue at all—at least at the expense of someone other than a volunteer—in class actions other than (b)(3) actions. In *Eisen* the Supreme Court carefully laid aside the dual problem of what notice, if any, might someday be necessary in favor of a (b)(1) or (b)(2) class's absent members, and who would be responsible for the expense. In *Sosna*, however, the Court indicated quite plainly that since the suit sought injunctive and declaratory relief, but not monetary relief, "the problems associated with a Rule 23(b)(3) class action, which were considered by this Court last Term in [*Eisen*]," did not exist. *Id.* Thus, speaking conservatively, it is by no means clear that advance notice to all affected individuals would have followed had the district court permitted appellants to litigate the merits of the consent decrees in a procedurally less-onerous form of Rule 23 class action. Of course, after *Eisen*, we do not suppose that appellants would have wished to proceed pursuant to Rule 23(b)(3), although we intimate no opinion concerning the nature of relief, if any, which may require a (b)(1) or (b)(2) action to accommodate the notice prescription applicable to class actions under (b)(3). We simply note, by way of summary, that appellants apparently seek to reach a particular destination—advance notice to all aggrieved steelworkers—by a rather dubious and, perhaps, prohibitively expensive route.

Nevertheless, some proviate parties *were* allowed to intervene and attack the decrees' legality subsequent to their entry. Certainly that factor alone did not moot the complaints about the absence of *prior* notice, but we have determined that those complaints lack merit. With respect to the party scope of the subsequent intervention, only NOW complains, and we have already rejected NOW's contentions. The dispute over participation by aggrieved employees thus reduces to the settled principle "that intervention will not be allowed for the purpose of impeaching a decree already made." United States v. California Coop. Canneries, 279 U.S. 553, 556, 49 S.Ct. 423, 424, 73 L.Ed. 838, 841 (1929). Naturally the rule is not inflexible, and we think the district court acted wisely in allowing the intervention that took place. *See* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv.L.Rev. 721 (1968). Yet the court clearly was entitled to limit the issues as it did, and to deny vacation of the decrees absent a convincing showing that they operated to violate substantial rights of the intervenors. *See generally* 3B. J. Moore's Federal Practice ¶¶24.16[1], 24.16[5], at 24-595-96, 24-651-52 (1974). They do not, and that decides this point.

## IV. RELIEF FOR WOMEN

On behalf of the three female appellants whom it was permitted to appoint as intervenors, NOW complains of certain alleged deficiencies in the items of relief afforded women under the consent decrees. These objections go squarely to the adequacy-in-fact of the decrees' remedial provisions, and therefore our limited scope of review precludes substitution of our judgment for that of the parties. We find none of these alleged shortcomings fatal to the decrees' legality, nor did their possible existence render Judge Pointer's approval of the decrees an abuse of discretion. We briefly discuss these objections.

First, NOW claims that the nation's female workforce is severely underrepresented in the steel industry. Conceding at least "tokenism" by the steel companies in the hiring of women since Title VII took effect on July 2, 1965, NOW nevertheless contends that gross underrepresentation persists—mainly in production and maintenance jobs and in trades and crafts—because many more women would be engaged in such occupations today but for alleged wholesale discharges and bans on new female hires in the post-war 1940's. NOW thus asserts that today's shortage of females in traditionally "male" jobs is a "present

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82. Reply Brief for Appellants Harris, et al., at 23. *See also* footnote 10, *supra.* The Harris intervenors' complaint in intervention before the district court was to the same effect. Specific reliance was placed on Rule 23. Appendix at 130a.

83. Certificate Required by Fifth Circuit Local Rule 13(a), Brief for Appellants NOW, et al. Because these (13(a) certificates are sometimes worded broadly in the interest of caution for which the court is appreciative—we add the following extract from NOW's amended complaint in intervention, filed in behalf of the three female appellants, which leaves no room for doubt:

> 3. Plaintiffs Beasley, Fix and Halascsak bring this action pursuant to Rule 23(b)-(2) and (3), F.R.C.P., on behalf of all former, present and future female employees of Defendant Companies. * * * The class is also composed of female persons who were, or might become members of the Defendant United Steelworkers of America, AFL-CIO, and who have been and continue to be or might be adversely affected by the practices complained of herein.

Appendix at 168a.

84. As did Judge Pointer. *See* 63 F.R.D. at 7.

85. *See, e.g.,* Franks, *supra,* 495 F.2d at 421-22; *Pettway, supra,* 494 F.2d at 256-57; Johnson v. Goodyear Tire & Rubber Co., *supra,* 491 F.2d at 1375; Bing v. Roadway Express, Inc., *supra,* 485 F.2d at 447-48; Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 801-02, *cert. dismissed,* 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655; Bowe v. Colgate-Palmolive Co., *supra,* 416 F.2d 711, 720. The usual arguments for (b)(2) treatment proceed from the theorem that "racial discrimination is by definition class discrimination." *E.g.,* Dickerson v. United States Steel Corp., *supra,* 64 F.R.D. at 357-59.

86. The notice contemplated by Rule 23-(d)(2), for example, is not mandatory, but rather discretionary with the trial court. *Bing, supra,* 485 F.2d at 448. "The rule . . . does not command the giving of any notice to members of (b)(1) and (b)(2) types of class actions, and "in the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class, will tend toward a minimum.'" 3B. J. Moore's Federal Practice ¶23.72, at 23-1421 (1974), *quoting* Advisory Committee Note, 1966 Amendments to F.R.-Civ.P. 23.

effect" of 1940's sex discrimination; that each of its victims should be identified and immediately hired or reinstated with full constructive seniority and back pay from two years prior to the filing of the first such charge; and that the consent decrees are defective as a matter of law because they do not provide this relief.

We may assume that NOW is correct on all the facts and most of the law, but the consent decrees stand. Assuming, for example, that massive discrimination in the 1940's survived the effective date of Title VII, that constructive seniority could properly be awarded, and that its recipients could show themselves entitled to some amount of back pay, the hurdles of limitations and laches are by now virtually insurmountable, as NOW admitted in the district court. Under these circumstances the decrees clearly are not fatally deficient for want of relief to women who were discharged or refused employment thirty years ago. In the event any woman feels she can sustain such a claim, the decrees plainly do not affect her ability to pursue it in a private suit.

Next, NOW attacks paragraph 10(a) of Consent Decree I, which provides that affirmative goals for female promotion into trades and crafts shall be based on the percentage of females in production and maintenance jobs. Proceeding once more from the alleged historic exclusion of women from both types of jobs, NOW maintains that paragraph 10(a) "makes a mockery" out of any obligation on the companies' part to promote females into trades and crafts.

NOW has simply overlooked paragraph 2(a)(1) of the Agreement incorporated into Consent Decree II. That paragraph establishes as an interim goal, subject to annual review, that twenty percent of all new hires in production and maintenance shall be female. That goal, together with mandatory utilization analyses, is likewise to be submitted to the OFCC for approval pursuant to Executive Order 11246.[87] Trade and craft jobs are among the more desirable and difficult in the plant. It is no surprise that the parties would create priorities in filling those jobs for persons already employed in the plant and thus familiar with its operations. Because the present number of women occupying production and maintenance jobs is small, NOW is correct in that the initial effect of the decrees is to set a relatively small numerical goal for females in trades and crafts. That condition, however, should be cured rather quickly as more women are hired into production and maintenance units and goals are periodically recomputed on the basis of plant population. As the percentage representation of women in production and maintenance grows by virtue of Decree II's hiring requirement, the numerical rate for female advancement to trades and crafts should rise correspondingly. And again, any woman who dislikes the goals established by the decrees retains her right to seek additional or inconsistent relief in court without forfeiting whatever benefits the decrees confer upon her.

NOW's final exclusively-feminist contention is a challenge to the decrees' failure to provide seniority carryover and rate retention for women who may seek to transfer from a technical, clerical, or plant security job into production and maintenance. NOW asserts that such relief is mandated by Bing v. Roadway Express, Inc., *supra*, where we held that a black "city" driver who had been discriminatorily excluded from a higher-paying "road" position was entitled to "road" seniority from the date at which he would have transferred, based on his qualifications, but for racial discrimination. We believe NOW places far too general a reliance on *BING*. Truck driving is essentially truck driving, though firms sometimes require more experience

87. We note that NOW apparently has also overlooked the fifty percent minority-female trade and craft ratio set forth in paragraph 10(d) of Consent Decree I, as well as the twenty-five percent minority-female supervisory goal and affirmative action duties undertaken by the companies in subparagraphs 2(a)(3) and (c), respectively, of Decree II's Agreement.



for "road" positions. By contrast, secretarial work and rail straightening are, at least in obvious respects, quite different. At any rate, the female appellants did not introduce any evidence into the record which might enable a court to develop this point in greater detail. Accordingly, we assume from our common experience that clerical-technical-plant security and production-maintenance are basically unrelated occupations. Of course, even if we are incorrect, and we know there *are* some similar jobs—*e.g.*, production record-keeping, the present state of affairs is not irrevocable; the progress under each decree is subject to continuing review and modification as circumstances justify. Likewise, any woman who considers herself aggrieved may file a charge and/or a lawsuit. The decrees themselves are not made unlawful simply because they presently fail to deal with every conceivable allegation of discrimination in the steel industry. In conclusion, NOW's claims on behalf of the three female appellants are without merit, NOW's misunderstanding of eligibility for back pay is easily resolved by a careful reading of paragraph 18(c) of Decree I; all other contentions are considered and rejected.

## V. CONCLUSION

We would be remiss if we failed to mention the decision of the Supreme Court in Albemarle Paper Co. v. Moody, — U.S. —, 95 S. Ct. 2362, 44 L.Ed.2d —, which was handed down on June 25, 1975, as we neared completion of our work in this case. We have reviewed *Moody* carefully—indeed with great particularity its repeated emphasis that one of Title VII's paramount purposes is "to make persons whole for injuries suffered on account of unlawful employment discrimination." At p. —, 95 S.Ct. at p. 2372. This emphasis is entirely consistent with the opinions from our circuit which we have cited or discussed herein. Furthermore, we are fully mindful that *Moody* reaffirms as "'[t]he general rule . . . that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury.'" *Id.* at —, 95 S.Ct. at p. 2372, *quoting* Wicker v. Hoppock, 73 U.S. 94, at 99, 6 Wall. 94, at 99, 18 L.Ed. 752.

Yet *Moody* does not affect our thinking about this case. The critical portion of the Court's rejection of "good faith" as a general defense to liability for back pay—a rejection already accomplished in a number of our decisions—begins on page 14 of the opinion, viz: "It follows that, given a *finding* of unlawful discrimination. . . ." (emphasis added). We may reasonably assume that the Court chose its words cautiously, for shortly thereafter it discussed in some detail the meaning of "clearly erroneous" in the context of other issues presented by *Moody*. Here, of course, we have no judicial *finding* of unlawful employment discrimination, only two consent decrees. To our knowledge they are governed by rules of law substantially less rigorous than those which govern contested litigation. Correspondingly, the scope of our appellate review is narrower, though no less deliberate. In sum, we adhere to our conclusions that these consent decrees are consistent with the public interest, that they represent a sound and reasonable exercise of the discretion possessed by the executive agencies, and that they implement the policies of Title VII and related laws to an exceptionally thorough degree. Unless settlement is to be held unlawful, we do not think the decrees may be struck down.

For the reasons assigned heretofore, the judgment of the district court is

Affirmed.

## U.S. v. ALLEGHENY-LUDLUM INDUSTRIES

**U.S. District Court**
**Northern District of Alabama**

UNITED STATES, etc. v. ALLEGHENY-LUDLUM INDUSTRIES, INC., et al., No. 74-P-339-S, June 7, 1974.

Proceeding in which individuals and groups seek to intervene in action under Title VII of Civil Rights Act of 1964 by U.S. Government agencies against steel companies and union, for purpose of challenging validity of two consent decrees. Individuals permitted to intervene, and decrees upheld.

Martin I. Slate, EEOC, Washington, D.C. (Robert T. Moore and Elaine Afable, U.S. Department of Justice, with him on brief), for plaintiff.

Michael H. Gottesman, Washington, D.C., for defendant union.

William E. Murray and James Forman, Jr., Birmingham, Ala., for defendant employers.

Jack Greenberg, New York, N.Y., Oscar W. Adams, Jr., Birmingham, Ala., Gerald Smith, Baltimore, Md., Bernard Marcus, Pittsburgh, Pa., and Gabrielle K. McDonald, Houston, Tex., for Harris intervenors.

Judith A. Lonquist, Chicago, Ill., for National Organization for Women.

William D. Wells, New York, N.Y., for Everett intervenors.

Eugene S. Bayer and Roy Kaufman, Cleveland, Ohio, for Edwards intervenors.

POINTER, District Judge: — After months of negotiations pursuant to the governmental conciliation function of Title VII, 42 U.S.C.A. § 2000e et seq., the parties herein reached a tentative agreement as to a manner and means for correcting allegedly discriminatory employment practices of a systemic nature at some 450 steel plants and other steel-related facilities throughout the nation. The agreement was reduced in writing in the form of two consent decrees entered into by the United States, through various governmental agencies including the Justice Department, the Labor Department and the Equal Employment Opportunity Commission, as plaintiff, and by nine steel companies and the United Steelworkers of America, as defendants. The proposed decrees were presented to, and entered by, this court on April 12, 1974, resulting in a broad national settlement of Title VII, and related, disputes between the United States and the ten defendants. The provisions reflect a thoughtful and earnest attempt to respond to—and to reconcile competition between—charges of employment discrimination made on behalf of black, female, and Spanish surnamed workers and applicants.

Consent Decree I takes the form of an injunction with respect to those matters which, in general, have previously been affected by collective bargaining between the companies and the union. The decree provides for a restructuring of seniority rules and regulations, primarily using plant continuous service as a base; specifies procedures respecting transfers, promotions, vacancies, layoffs and recalls, and enumerates affirmative action guidelines and goals with respect to trade and craft positions and initial selection and assignment of employees. In recognition that general standards may require tailoring to meet local problems and that experience may indicate the inadequacy of some of the remedial steps, implementation procedures and enforcement tools are established through a structure of Implementation Committees, composed of company, union and majority members, at each affected facility, as well as an Audit and Review Committee which is national in scope. A mechanism for expeditious and coordinated resolution of the multitude of pending EEOC charges respecting these defendants is established. A potential back-pay fund of $30,940,000.00 is created, along with guidelines for calculating and disbursing awards to electing individual employees affected by past discrimination. Jurisdiction is retained by the court for a period of at least five years.



Consent Decree II takes the form of a general injunction respecting those aspects of employment which are, essentially, company-controlled and not normally subject to collective bargaining agreements. The companies are generally enjoined from any form of employment discrimination and are obligated to institute a program of affirmative action with respect to hiring, initial assignments, and management training programs, as well as affirmative recruitment of minorities. See Morrow v. Crisler, 491 F.2d 1053 (CA5 1974); Franks v. Bowman Transportation Co., ..... F.2d ....., (CA5 #72-3239; June 3, 1974). The court retains jurisdiction for at least five years; and, as also is true regarding Consent Decree I, the consent decree between the government and the defendants does not purport to bind any individual employee or to present the institution or maintenance of private litigation.

Shortly after entry of these decrees, various individuals and organizations sought to intervene. A hearing was set for May 20, 1974, with the request that briefs be filed by May 13th and reply briefs by the hearing date. This memorandum is addresed to the claims for intervention and certain other issues raised thereby and is issued after a study of the motions, briefs, reply briefs, and oral argument presented at the May 20th hearing.

**Intervention**

The court concludes that §§ 707(e) and 706 of Title VII, 42 U.S.C.A. § 2000e-7(e) and 2000e-5, confer upon some petitioners a right to intervene within the meaning of Rule 24(a)(1), F.R.C.P. This statutory right is provided to a "person or persons aggrieved" within the meaning of Title VII. In this context, the term refers to those individuals with respect to whom alleged discrimination by the defendants is within the scope of a charge which has heretofore been presented to the EEOC, without regard to whether such charge was filed by them, by fellow employees with similar complaints, by an organization on their behalf, or by a member of the EEOC, and without regard to whether or not they are named plaintiffs or actual or putative class members in pending litigation.

Most of the individual petitioners—including some who joined in the petitions of the Ad Hoc Committee and of the National Organization of Women[1]—meet the test for intervention of right under Rule 24(a)(1) as just stated. The court concludes that the balance of the individual petitioners — including one who is the principal officer of the Rank and File Committee, the other organizational petitioner—should also be allowed to intervene, given the rather limited purpose for which intervention is being allowed, under the provisions of Rule 24(a)(2) or 24(b)(2).

The court denied the requests for intervention by the three organizations, the Ad Hoc Committee, NOW, and the Rank and File Committee. While such organizations may have authority to file charges with the EEOC and even to file lawsuits with respect thereto, they are not "persons aggrieved" for the purpose of any statutory right of intervention under Rule 24(a)(1). In view of the allowed intervention of officers or members of such organizations, it appears that adequate representation is being afforded for any interest the organizations may have. See Rule 24(a)(2) and Hines v. Rapides Parish School Board, 479 F.2d 762 (CA5 1973). Nor, indeed, have the organizations demonstrated a sufficient interest qua organizations to justify the additional problems of management and inconvenience caused by unnecessary intervenors. See Bennett v. Madison County Board of Education, 437 F.2d 554 (CA5 1970); Horton v. Lawrence County Board of Education, 425 F.2d 735 (CA5 1970).

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1. On May 20, NOW was given leave, essentially *nunc pro tunc*, to amend its pleadings, which were filed only on behalf of the organization, to name not more than three individual women who were to be allowed to intervene pursuant to Rule 24-(a)(1) or (b). Such amended pleadings were filed with the court on June 4, 1974.

Such intervention as is allowed is permitted at this time[2] for the limited purposes of seeking to stay or vacate the consent decrees and to question the contemplated releases of back pay claims in connection with the payments of back-pay to electing employees under the decree. While the intervenors are to be bound by the decision made with respect to such limited issues the court does not consider that such intervenors, or any class which they may represent, are at present bound, as a matter of res adjudicata or collateral estoppel, to the terms of the consent decrees themselves.

No evidentiary hearings are needed with respect to the issues on which intervention has been allowed. Based upon responses by counsel to questions posed by the court at the May 20th hearing, it is clear that any additional hearings would merely involve an attempt by intervenors to demonstrate in greater detail the alleged deficiencies and problems presented by the decrees, e.g., that the decrees are somewhat open-ended and that there may be already some understandings or proposals as to the manner in which such details will be resolved.[3] There was no indication, however, that any evidence would be tendered respecting the basic allegations against the decrees which are not apparent upon the record. Moreover, time weighs heavy in this dispute, for not only must implementation go forward to meet timetables in the decree, but also delay would adversely affect many of the admittedly prophylactic provisions of the decrees to the detriment of the beneficiaries of Title VII. As the court is convinced that the suggested evidence would not materially contribute to the resolution of the limited issues upon which intervention has been allowed, there is no sound reason to schedule an evidentiary hearing.

**Alleged Illegality of Consent Decree**

Intervenors attack the consent decree on various grounds of alleged illegality, including vagueness; venue deprival; lack of advance notice, enforcement by violators; insufficiency of relief; direct interference with rights of individuals to file, maintain or pursue individual remedies; and a renunciation of statutory responsibility by executive agencies.

Without here separately listing the considerations involved in each of these thrusts, the court concludes that, as attacks on the decrees as a whole, they are due to be denied and overruled, and that the intervenors do not demonstrate or suggest anything illegal, improper or fundamentally unsound in these decrees, which, it should be emphasized, are not binding on individual employees.

By undertaking to resolve by settlement the myriad of problems regarding employment discrimination in the steel industry—discussions to which individual employees and their supporting organizations were not privy—the executive agencies have not renounced their statutory responsibilities as alleged. Such efforts are consistent, not inconsistent, with the statutorily mandated duty of conference, conciliation and persuasion embodied in Title VII. It moreover appears that the commitment[4] undertaken by the government with respect to pending or future Title VII litigation involving these defendants does not preclude the government from advocating, and bringing expeditiously into court if a satisfactory resolution is not accomplished through the settlement procedures established, a claim for other relief by an aggrieved employee.

The court does recognize that these decrees may, as a practical matter, impede, if not impair, some interests of private litigants. Indeed, it must be assumed that concessions during settlement negotiations were motivated in part by the desire of the parties to avoid, by anticipatory corrections, future litigation and to provide more expeditious solutions even in matters already in the judicial processes. Justice delayed may, it is said, be justice denied. Moreover, it must be kept in mind that resolution in this forum of issues between the government and the defendants does not preclude additional—or even inconsistent—relief in favor of parties in other litigation. As stressed by Congress in the passage of Title VII and its amendments, settlement offers the principal hope for rapid correction of the ills of employment discrimination, preserving, however—as here—the right to litigate where the persons aggrieved are not parties to the conciliation agreement and believe the settlement to be unsatisfactory.

Some of the wording of the consent decrees may on its face improperly affect the maintenance of private actions. For example, the decrees provide for mailing of back-pay notices even to those involved in pending legislation as named plaintiffs or as determined or putative class members. In view of the court's retained powers and in view of the presence of the parties to this litigation before other forums, such problems, as they are identified, can be satisfactorily resolved, and no doubt there will be a need from time to time for liaison and co-ordination between this court and other forums. The decrees may require clarification in some particulars and, indeed, as administration of the decrees continues, there will doubtless be problems which were not considered or anticipated by the parties or which run counter to their expectations during negotiations. Should such eventualities occur, the court, by virtue of paragraph 20[5] of Consent Decree I and paragraph 2[6] of Consent Decree II, has jurisdiction of this cause for the purpose of issuing subsequent orders, consistent with principles of due process, as necessary to further the purposes and objectives of these decrees.[7]

The court finds nothing illegal respecting the consent decrees themselves, neither in the basic approach to settlement reflected therein, the way in which such were negotiated and entered, nor the manner in which such will be implemented. Parenthetically, the court notes that the suggestion that advance notice was a requirement for the decree—which does not rise to the status of a class

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2. This is without prejudice to the rights of individuals to seek further intervention, in accordance with the rulings herein, respecting specific questions which have arisen or may arise in the future. See Hines v. Rapides Parish School Board, 479 F.2d 762 (CA5 1973). The limitation upon present intervention is placed so that the resolution of the fundamental questions will not be delayed by disputes over matters which, in essence, are details.

3. See note 2 supra.

4. A letter from the original parties herein was received by the court on June 3, 1974. Such has been filed on record as it serves to clarify the obligations of the United States with respect to future action pursuant to the consent decrees. Nor would it be sound to assume that the government can not oppose relief sought by a private litigant: for example, if a particular black plaintiff, due to his own situation, were to seek an occupational seniority rule considered by the EEOC to be generally adverse to the interests of other black employees, it could hardly be asserted that the EEOC is bound to advocate such relief.

5. "20. Retained Jurisdiction—The court hereby retains jurisdiction of this cause for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this Decree.

Anytime after the conclusion of five (5) years from the date of this decree, any party may move to dissolve this decree in whole or in part."

6. "2. The court hereby retains jurisdiction of this cause for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this decree and/or the agreement attached hereto.

Anytime after the conclusion of five (5) years from the date of this decree, any party may move to dissolve this decree in whole or in part."

7. By letters of June 3, 1974, referred to in note 4 supra, the original parties herein have stated that all parties accept the court's view of authority to review any action taken pursuant to the decrees, including actions of the Audit and Review Committee, whether or not any party requests such review. Also, such parties, while perhaps disagreeing with the court as to the limits involved, acknowledge the concept of retained jurisdiction with respect to the effectuation of the full purpose of the decrees. Notwithstanding any such disagreement with the court's view of such powers, the parties advised the court "that none of them wishes to cancel or revoke its consent or withdraw from the Consent Decrees in the above-captioned case."

action decree—would likely haunt, if adopted by the court, the intervenors and their sponsoring organizations in other litigation. Cf. Eisen v. Carlisle & Jacquelin, 42 LW 4804 (May 28, 1974).

**Alleged Illegality of Back-Pay Release**

In connection with the claim of illegality, some intervenors have raised the question of the binding effect of a release executed by employees who accept back-pay under the decree. The consent decree, however, while providing for the use of such a release, does not contain a judicial finding or conclusion that such could be efficacious. This is an issue in which all parties have an interest and, as a practical matter, is in need of a present resolution. The basic question is whether a signed release in exchange for the payment of back-pay determined under a settlement procedure, as contemplated in paragraph 18(g) of Consent Decree I, can be valid as a matter of public policy.

Intervenors cite, among other similar decisions, Schulte v. Gangi, 328 U.S. 108 (1946), an FLSA case, for the proposition that such a release would be invalid as contravening public policy. Such FLSA cases are, however, distinguishable from the instant case. Relief under the FLSA is defined, 29 U.S.C.A. § 216(c), while Title VII relief is more flexible, 42 U.S.C.A. § 2000e-5(g). While the amount of back-pay for an FLSA violation is, essentially, a matter of simple calculation subject only to the statutory requirements of the Act, Title VII back-pay awards are much more difficult of ascertainment as such are subject to innumerable variables. Schulte seems to be most concerned with the leverage afforded employers *if* employees could be persuaded or coerced into waiving statutory pay minimums.

The legislative history of Title VII, as well as the Act itself in providing substantial mechanisms for conciliation and settlement, 42 U.S.C.A. §§ 2000e-5(b) and (f), indicates a Congressional desire for out-*of*-court settlement of Title VII violations.

In Alexander v. Gardner-Denver Co., 42 LW 4212, 4219 (1974) the Supreme Court indicates that there presumably may be an effective release of Title VII claims where the parties enter into a voluntary settlement. For such a waiver to be effective, however, the employee's consent to the settlement must be both "voluntary and knowing". Id. at 4219 n.15. See also Pettway v. American Cast Iron Pipe Co. 494 F.2d 211 at notes 152 and 156a (CA-5 # 73-1163, 1974), in which the Fifth Circuit seems to indicate its approval of voluntary settlement of similar issues.

This court concludes that there can be a legal waiver of back-pay claims where, for valuable consideration, a release is signed knowingly and voluntarily, with adequate notice which gives the employee full possession of the facts. Such a ruling, however, is not to be taken as a prospective ruling on the question of the efficacy of any particular release, as such would require an individual determination of the factul setting in which such release may be executed.

**Conclusion**

For the reasons indicated, the court has allowed intervention by the individual petitioners for the limited purposes of seeking to stay or vacate the consent decrees and of challenging the legal efficacy of settlement release of back-pay claims and has denied the claims of such intervenors with respect thereto. Intervention by other petitioners or for other purposes has, at present, been denied. By separate document, the order of the court with respect to such matters is filed concurrently herewith.

**Order**

In accordance with the Memorandum of Opinion filed concurrently herewith, it is ORDERED, ADJUDGED and DECREED as follows:

(1) The following petitioners are hereby allowed to intervene for the limited purposes of seeking to stay or vacate the consent decrees and of challenging the legal efficacy of settlement releases of back-pay claims: Sidney S. Harris, Willie J. Fonville, Paige A. Millhouse, John S. Ford, Willie Cain, Willie L. Coeman, Joe N. Tayor, Robert Cain, David Bowie, Earl Bell, Bernard Lane, Ellis Lewis, Levy Mazyck, George Mercer, Robert Skates, Jimmie L. Rogers, John A. Turner, John Taylor, Luther Reden, C. L. Garland, L. C. Waker, James L. Allen, Joseph Kimbrough, Joe Bryant, Joseph Faulkner, Isaiah Hayes, III, K. D. Pender, Charles R. Brown, Robert L. Hill, William R. Tilghman, Albert Everett, Nathaniel King, Roy Walker. Cathlene Beasley, Lessie O. Bolin Fix, Bonnie Halascak and George Edwards. Their intervention for purposes other than those specified is, at present, hereby denied.

(2) The requests of the National Organization of Women, the National Ad Hoc Committee of Steelworkers and the National Steelworkers Rank and File Committee for intervention herein are hereby denied.

(3) The limited claims of the intervenors, for which intervention is allowed, are hereby denied and overruled.

(4) Each party, intervenor, and petitioner is to bear its own costs.